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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1683.

JOHN M. ROSS, APPELLANT,

vs.

JAMES McINTYRE, SUPERINTENDENT OF THE PENITENTIARY OF THE STATE OF NEW YORK AT ALBANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED MARCH 30, 1891.

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INDEX.

	Original.	Print.
Petition for writ of *habeas corpus*	1	1
Conditional pardon	5	3
Acceptance of pardon	7	3
Certificates of U. S. consul general	7	4
Clerk's certificate	9	5
Writ of *habeas corpus*	10	5
Stipulation waiving production of petitioner, &c.	11	5
Proof of service of writ of *habeas corpus*	12	6
Return to writ of *habeas corpus*	13	6
Conditional pardon	13	6
Acceptance of pardon	15	7
Certificates of U. S. consul general	16	7
Return of Superintendent McIntyre	18	8
Minutes of hearing and submission	19	8
Order remanding petitioner and dismissing writ	20	9
Copy of files in Department of State	24	10
Certificate of Secretary of State	24	10
Letter of Consul General Van Buren to Assistant Secretary Hay, May 22, 1880	24	10
Complaint of master of ship "Bullion"	29	12
Amended complaint of master of ship "Bullion"	30	13
Record of consular-general court	31	13

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	Original.	Print.
Testimony of John P. Reed	36	16
Samuel Scott	38	17
William Thomas	41	18
Charles Brown	45	20
Thomas H. Tripler	48	22
John Coyle	50	23
James Bennett	53	24
George W. Elmer	57	26
Kuma Ishikawa	58	26
Walter Loxton	59	27
John P. Reed (recalled)	59	27
Alfred Stanley	60	27
Harriet Brown	61	28
Mary Glass	62	29
Judgment and sentence	63	29
Demurrer	66	31
Opinion on demurrer	67	31
Affidavit of John Martin Ross	72	33
Motion to dismiss	73	34
Motion for postponement	74	34
Affidavit of John Martin Ross	74	34
Subpœna to F. E. Foster	77	35
E. H. R. Manley	79	35
F. H. Olmstead	81	37
O. Keil	83	37
Motion for jury trial	85	38
Demurrer	85	38
Notice as to witnesses for prosecution	86	39
Subpœna to Dr. T. H. Tripler	88	39
Motion for postponement	90	40
Affidavit of John Martin Ross	90	40
Consul general's certificate	91	40
Approval of American minister	92	41
Opinion of Judge Wallace	93	41
Appeal and allowance of same	98	43
Citation and proof of service of same	99	44
Clerk's certificate	100	44

1 *Petition for Writ.*

In the Circuit Court of the United States for the Northern District of New York.

To the Honorable William J. Wallace, judge of the above-entitled court:

The petition of John M. Ross respectfully shows—

That he is deprived of his liberty and unlawfully confined by James McIntyre, superintendent of the Albany penitentiary, in the city of Albany, in the State of New York, under or by order of the authority of the United States, to wit, by virtue of a duly certified copy of a warrant of pardon and commutation of sentence issued by Rutherford B. Hayes, President of the United States, on the sixth day of August, A. D. 1880, and an acceptance of such commutation of sentence executed by your petitioner on the 28th day of February, 1881, said copy being certified by Thomas B. Van Buren, consul general of the United States at Kanagawa, Japan (duly certified copies of which warrant and acceptance are hereunto annexed).

Said warrant was issued under the following circumstances, to wit: Your petitioner, on the ninth day of May, 1880, being a British subject and one of the crew of the American vessel "Bullion," the ship at that time being in the harbor of Kanagawa, Japan, was arrested on the charge of murdering one Robert Kelly on
2 the said vessel "Bullion" at the time and place aforesaid.

That afterwards, to wit, on the 20th day of May, 1880, your petitioner was tried in the United States consular-general court at said Kanagawa, Japan, before Thomas B. Van Buren, at that time consul general of the United States at said Kanagawa, Japan, upon the aforesaid charge of murder, and was adjudged guilty thereof and, in pursuance of said judgment and conviction, sentenced by said Thomas B. Van Buren to suffer the penalty of death at such time and place and in such manner as was directed by John A. Bingham, then envoy extraordinary and minister plenipotentiary of the United States of America in Japan, such prosecution being instituted and your petitioner being held to answer for said crime and tried and convicted thereof solely by, upon, and under a complaint filed in the United States consular-general court at Kanagawa, Japan, on the tenth day of May, 1880, by one J. P. Reed, master of said ship "Bullion," and said trial being before Thomas B. Van Buren, then consul general, and four associates selected by lot, sitting without a jury and without any indictment or presentment of a grand jury.

That afterward John A. Bingham, envoy extraordinary and minister plenipotentiary of the United States of America as aforesaid, suspended the execution of said sentence and submitted the proceedings of said trial to the President of the United States of
3 America, who then and there granted a conditional pardon and commutation of sentence to your petitioner, whereby the sentence of death was commuted, and it was ordered that your peti-

tioner should be imprisoned for the term of his natural life in the Albany penitentiary, in the State of New York.

And your petitioner further shows that in pursuance of said decree and commutation he has ever since the same were published and declared been forcibly detained and imprisoned against his will, and that such confinement, restraint, and imprisonment still continues, in the penitentiary at Albany, New York, and also in pursuance of said decree and commutation your petitioner is held by said James McIntyre, superintendent of the Albany penitentiary.

Further, your petitioner shows that the crime alleged to have been committed by your petitioner, and for which he is now confined, was not committed nor did the case arise in the land or naval forces of the United States, or in the militia, nor was said holding, trial, and conviction of your petitioner in pursuance or by virtue of any indictment or presentment of a grand jury, nor was such indictment found or presentment made in his case.

And your petitioner complains of his imprisonment and detention under the proceedings had in his case and claims that the United States consular-general court at Kanagawa, Japan, had no
4 jurisdiction, right, or authority legally to hold, try, and sentence him in the manner and form above stated, as the crime for which your petitioner was held was an infamous crime, and such proceedings having been by complaint before the United States consul general at Kanagawa, Japan, and not by indictment or presentment by a grand jury, as required and guaranteed by article fifth of the amendments to the Constitution of the United States.

Wherefore your petitioner claims that the whole of the said proceedings and his imprisonment under said proceedings have been illegal, null, and void and his further imprisonment contrary to and in violation of the law of the land, and in order to be released from said unlawful restraint and imprisonment your petitioner prays that a writ of *habeas corpus* may be directed to the said James McIntyre, superintendent of the said Albany penitentiary, and issue in behalf of your petitioner, so that the body of the petitioner may be produced before this honorable court or such other court or judge as the writ may be made returnable before, to do, submit to, and receive what the law may require.

JOHN M. ROSS.

Witness:
AUGUSTUS BOWERS.

UNITED STATES OF AMERICA,
Northern District of New York, } ss:

John M. Ross, being duly sworn, deposes and says that he is the petitioner in the above petition described and who signed the
5 same; that he has read the said petition and knows the contents thereof, and that the same is true, to the best of his knowledge and belief.

JOHN M. ROSS.

Sworn to before me this 15 day of *January* March, 1890.
[L. S.] AUG'T BOWERS,
Notary Public, Albany, N. Y.

Rutherford B. Hayes, President of the United States of America, to all to whom these presents shall come, Greeting:

Whereas John M. Ross, an American seaman on board of the American ship "Bullion," was, on the 20th day of May, 1880, convicted of the crime of murder, committed on board of said ship "Bullion," then in the harbor of Yokahama, Japan, before Thomas B. Van Buren, Esquire, consul general of the United States at Kanagawa, Japan, holding court at that place, and was by said consul general, on such conviction aforesaid, in pursuance and by authority of the statutes of the United States to that end made and provided, sentenced to be hanged at such time and place as the United States minister in Japan may direct, according to law;

And whereas Mr. Bingham, the United States minister aforesaid, on the 22nd day of May following, approved the proceedings, verdict, and sentence;

6 And whereas the said minister has postponed the execution of the sentence, believing the ends of justice demand it, and has submitted the record of the case to the Department of State for the President's consideration, for commutation of sentence or pardon if deemed advisable;

And whereas the President, upon a careful consideration of the facts and circumstances of the case as these are presented in the record of the proceedings and by a report from the Secretary of State, has arrived at the conclusion that the ends of justice will be fulfilled by the infliction of a less severe punishment than that of death:

Now, therefore, be it known that I, Rutherford B. Hayes, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons also me thereunto moving, do hereby pardon the said John M. Ross on condition that the said John M. Ross be imprisoned at hard labor, for the term of his natural life, in the Albany penitentiary, in the State of New York.

This order will be carried into effect under the direction of the Secretary of State.

In testimony whereof I have hereunto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this sixth day of August, A. D. 1880, and of — Independence of the United States the one hundred and fifth.

(Signed) R. B. HAYES.

By the President:
(Signed) WM. M. EVARTS,
Secretary of State.

7 I, John M. Ross, the person named in the warrant of conditional pardon granted to me by the President of the United States of America, dated 6th day of August, 1880, and of which the

foregoing is a true and correct copy, do hereby acknowledge the delivery of said original warrant of conditional pardon to me, and do hereby voluntarily and without qualification accept such conditional pardon, with the condition thereof as therein stated, to wit, that "I, Rutherford B. Hayes, President of the United States of America, &c., &c., do hereby pardon the said John M. Ross on the condition that the said John M. Ross be imprisoned at hard labor for the term of his natural life in the Albany penitentiary, in the State of New York."

JOHN M. ROSS.

Kanagawa, Yokohama, Japan, February 28th, 1881.

Witness:
THOS. B. VAN BUREN,
U. S. Consul General.

U. S. CONSULATE GENERAL, KANAGAWA, JAPAN.

I hereby certify that the foregoing paper is a full, true, and correct copy of the original warrant of conditional pardon granted by the President of the United States to John M. Ross, a prisoner now in my custody, he having been convicted heretofore in the court of this consulate general of murder; and I further certify that
8 the endorsement on the said original pardon and on this copy were signed by said Ross, the person named therein, on the respective dates named therein, in my presence, after he had carefully read the contents of both of said papers and both said endorsements.

Witness my hand and official seal this 28th February, A. D. 1881.
(Signed) THOS. B. VAN BUREN,
U. S. Consul General.

U. S. CONSULATE GENERAL, KANAGAWA, JAPAN.

I hereby certify that the foregoing is a true copy of the original warrant of conditional pardon granted by the President of the United States to John M. Ross, a prisoner in the jail attached to the consulate general, duly convicted in this consular-general court of murder and sentenced to death, and that the endorsement thereon signed by said Ross is a true copy of the endorsement on said original warrant also signed by him, and that the endorsement thereon — signed by me on the copy of the original warrant delivered by me to said Ross.

Witness my hand and official seal this 28th February, A. D. 1881.
THOS. B. VAN BUREN, [SEAL.]
U. S. Consul General.

I hereby certify that this is a true copy of the commitment of John M. Ross, now imprisoned in the Albany penitentiary, and the only papers by which he is held in this prison.

AUG'T BOWERS, *Clerk.*

Albany, Jan. 22, '90.

9 UNITED STATES OF AMERICA, *Northern District of New York*, } ss:

Augustus Bowers, being duly sworn, deposes and says that he is the clerk of the Albany penitentiary; that the above and foregoing is a full, true, and complete transcript and copy of the warrant of commitment on file and of the record in the clerk's office of said penitentiary relating to the United States prisoner John M. Ross, and by virtue of which said Ross is imprisoned in said penitentiary.

AUGUSTUS BOWERS.

Sworn to before me this 17th day of March, 1890.

HOWARD PADDOCK,
[L. S.] *Notary Public, Albany, N. Y.*

(Indorsed:) Crim. 365. *In re* John M. Ross. Petition for writ of *habeas corpus*. Allowed. Returnable M'ch 25, 1890. A. C. C. Filed M'ch 19, 1890. W. J. Doolittle, clerk.

10 *Writ.*

The President of the United States of America to James McIntyre, the superintendent of the penitentiary of the State of New York at Albany, Greeting:

You are hereby commanded that you have the body of John M. Ross, by you imprisoned and detained, as it is said, together with the cause of such imprisonment and detention, by whatsoever name the said John M. Ross shall be called or charged, before the honorable circuit court of the United States for the northern district of New York, at the court-room of said circuit court, in the United States court-house, in the city of Utica, on the 25th day of March, A. D. 1890, at the hour of 10 o'clock a. m. of that day, to do and receive what shall then and there be considered concerning the said John M. Ross.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Utica, [L. S.] in the northern district of New York, this 19th day of March, A. D. 1890.

W. S. DOOLITTLE, *Clerk.*

GEO. W. KIRCHWEY,
Attorney for Petitioner, Albany, N. Y.

11 *Stipulation.*

United States Circuit Court for the Northern District of New York.

Ex Parte Ross.

It is stipulated and agreed that the production of the body of John M. Ross under the writ of *habeas corpus* granted and issued this 19th day of March, 1890, by and out of this circuit court upon the return day of the writ is waived, and that the cause of deten-

tion shall be considered upon the petition, the papers therein referred to, and the return of James McIntyre, the superintendent of the penitentiary of the State of New York at Albany, with full legal effect as if the body of said John M. Ross were before the court.

GEO. W. KIRCHWEY,
Attorney for Petitioner.

12 *Certificate.*

I certify that on the 21st day of March, 1890, at the city of Albany, county of Albany, State of New York, in my district, I personally served the within writ of *habeas corpus* and stipulation on the within-named James McIntyre, superintendent of the Albany county penitentiary, by showing to him the same with the seal of the court thereon, and by leaving with him a copy thereof.

A. E. BAXTER, *U. S. Marshal,*
By LUCIEN TUFFS, *Deputy.*

(Indorsed:) Crim. No. 365. United States circuit court, northern district of New York. In the matter of John M. Ross. Writ of *habeas corpus* and stipulation. Filed March 24, 1890. W. S. Doolittle, clerk.

13 *Return to Writ.*

"Copy." (Seal.)

Rutherford B. Hayes, President of the United States of America, to all to whom these presents shall come, Greeting:

Whereas John M. Ross, an American seaman on board of the American ship "Bullion," was, on the 20th day of May, 1880, convicted of the crime of murder, committed on board the said ship "Bullion," then in the harbor of Yokohama, Japan, before Thomas B. Van Buren, Esquire, consul general of the United States at Kanagowa, Japan, holding court at that place, and was by said consul general on such conviction aforesaid, in pursuance and by authority of the statutes of the United States to that end made and provided, sentenced to be hanged, "at such time and place as the United States minister in Japan may direct, according to law;"

And whereas Mr. Bingham, the United States minister aforesaid, on the 22nd of May following, approved the proceedings, verdict, and sentence;

And whereas the said minister has postponed the execution of sentence, believing the ends of justice demands it, and has submitted the record of the case to the Department of State for the
14 President's consideration and for commutation of sentence or pardon, if deemed advisable;

And whereas the President, upon a careful consideration of the facts and circumstances of the case as there were presented in the record of the proceedings and by a report from the Secretary of State, has arrived at the conclusion that the ends of justice will be

fulfilled by the inflection of a less severe punishment than that of death:

Now, therefore, be it known that I, Rutherford B. Hayes, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons also *one* thereunto moving, do hereby pardon the said John M. Ross on condition that the said John M. Ross be imprisoned at hard labor for the term of his natural life in the Albany penitentiary, in the State of New York.

This order will be carried into effect under the direction of the Secretary of State.

In testimony whereof I have hereunto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this sixth day of August,
[SEAL.] A. D. 1880, and of the Independence of the United States the one hundred and fifth.

(Signed) R. B. HAYES.

By the President:
(Signed) WM. M. EVARTS,
Secretary of State.

15 I, John M. Ross, the person named in the warrant of conditional pardon granted to me by the President of the United States of America, dated the 6th day of August, 1880, and of which the foregoing is a correct copy, do hereby acknowledge the delivery of said original warrant of conditional pardon to me, and do hereby voluntarily and without qualification accept said conditional pardon with the condition thereof as therein stated, to wit, that "I, Rutherford B. Hayes, President of the United States of America, &c., &c., do hereby pardon the said John M. Ross on the condition that the said John M. Ross be imprisoned at hard labor for the term of his natural life in the Albany penitentiary, in the State of New York."

JOHN M. ROSS.

Kanagawa, Yokohama, Japan, February 28th, 1891.

Witness:
THOS. B. VAN BUREN,
U. S. Consul General.

16 U. S. CONSULATE GENERAL, KANAGAWA, JAPAN.

I hereby certify that the foregoing paper is a full, true, and correct copy of the original warrant of conditional pardon granted by the President of the United States to John M. Ross, a prisoner now in my custody, he having been convicted heretofore in the court of this consulate general of murder; and I further certify that the endorsement- on the said original pardon and on this copy were signed by the said Ross, the person named therein, on the respective dates named therein, in my presence, after he had carefully read the contents of both said papers and both of said endorsements.

[SEAL.] Witness my hand and official seal this 28th February, 1881.

(Signed) THOS. B. VAN BUREN,
U. S. Consul General.

17 U. S. CONSULATE GENERAL, KANAGAWA, JAPAN.

I hereby certify that the foregoing is a true copy of the original warrant of conditional pardon granted by the President of the United States to John M. Ross, a prisoner in the jail attached to the consulate general, duly convicted in this consular-general court of murder and sentenced to death, and that the endorsement thereon signed by said Ross is a true copy of the endorsement on said original warrant also signed by him, and that the endorsement thereon signed by me is a true copy of the endorsement signed by me on the copy of the original warrant delivered by me to said Ross.

[SEAL.] Witness my hand and official seal this 28th February, A. D. 1881.

THOS. B. VAN BUREN,
U. S. Consul General.

(Indorsed:) John M. Ross. Murder. Life. Delivered by H. Latham, Esq., special U. S. marshal, April 13, 1881.

18 ALBANY COUNTY PENITENTIARY,
SUPERINTENDENT'S OFFICE,
ALBANY, N. Y., *March* 24, '90.

James McIntyre, sup't.

To the Hon. Melville W. Fuller, Chief Justice of Supreme Court of the United States.

SIR: I, James McIntyre, superintendent of Albany penitentiary, at Albany, N. Y., hereby certify that the accompanying document is a true copy of the warrants by and under which I hold and detain the body of one John M. Ross, a United States convict, in this penitentiary, and the whole thereof.

Respectfully yours, JAMES McINTYRE,
Superintendent,
Per BOWERS.

(Indorsed:) Crim. 365. *In re* Ross. Return to writ of *habeas corpus.* Filed Mar. 27, 1890. W. S. Doolittle, clerk.

19 *Minutes of Hearing.*

At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the U. S. court-house, in the city of Syracuse, on the 26 day of November, A. D. 1891.

Present: The Honorable William J. Wallace, judge.

In Re Petition of JOHN ROSS on *Habeas Corpus.*

Mr. G. W. Kirchwey is heard for petitioner; Mr. John E. Smith, ass't U. S. att'y, is heard on behalf of U. S.

Court takes papers.

Decision reserved.

20 *Order.*

At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the U. S. court-house, in the city of Albany, on the 21st day of January, A. D. 1891.

Present: The Honorable William J. Wallace, judge.

In the Matter of JOHN M. ROSS upon a Writ of *Habeas Corpus.*

A writ of *habeus corpus* having, on the 19th day of March, A. D. 1890, been issued out of the circuit court of the United States for the northern district of New York, directed to James McIntyre, superintendent of the penitentiary at Albany, N. Y., commanding him to have the body of said John M. Ross, by him imprisoned and detained, together with the cause of such imprisonment and
21 detention, before the said circuit court, at the court-room of said circuit court, in the United States court-house in the city of Utica, on the 25th day of March, A. D. 1890, at 10 o'clock a. m. of that day, and the said John M. Ross having, by his counsel, stipulated that the production of the body of said Ross under said writ of *habeas corpus* is waived, and that the cause of detention of said Ross shall be considered upon the petition, the papers therein referred to, and the return of said James McIntyre, with full legal effect as if the body of said John M. Ross were before the court; and the said James McIntyre, as such superintendent, having made his return to said writ, by which it appears that said John M. Ross, an American seaman on board of the American ship "Bullion," was on the 20th day of May, 1880, convicted of the crime of murder, committed on board the said ship "Bullion," then in the harbor of Yokohoma, Japan, before Thomas B. Van Buren, Esquire, consul general of the United States at Kanogowa, Japan, holding court at that place, and was by said consul general, on such conviction, in pursuance and by authority of the statutes of the United States to that end made and provided, sentenced to be hanged at such time and place as the United States minister in Japan may direct according to law, which proceedings, verdict, and sentence was on the 22nd day of May, 1888, approved by said minister, and by which return it also appears that on
22 the 6th day of August, A. D. 1890, the President of the United States, by an instrument in writing duly executed, pardoned the said John M. Ross of the said offence on condition that the said John M. Ross be imprisoned at hard labor for the term of his natural life in the Albany penitentiary, in the State of New York, and which pardon, with the condition aforesaid, was by the said John M. Ross accepted in writing, and by which return it

appears that said John M. Ross is now imprisoned in the said penitentiary and being deprived of his liberty pursuant to said conviction, sentence, and accepted conditioned pardon, and upon the return of said writ of *habeas corpus* the said John M. Ross, by his said counsel, having moved that he, the said John M. Ross, be discharged from his said imprisonment, claiming that the aforesaid trial, conviction, sentence, and conditioned pardon were illegal and that his said imprisonment is unlawful and illegal, and after hearing George W. Kirchwey, of counsel for said John M. Ross, asking that he be discharged from said imprisonment for the reasons aforesaid, and after hearing John E. Smith, assistant United States attorney, in opposition—

It is ordered that the said motion for the discharge of the said John M. Ross from his aforesaid imprisonment be, and the same
23 hereby is, denied, and the said John M. Ross is hereby remanded to the said penitentiary and to the custody of said James McIntyre, the superintendent thereof, and the said writ of *habeas corpus* is hereby dismissed.

WM. J. WALLACE.

(Indorsed:) In United States circuit court, northern district of New York. In the matter of the writ of *habeas corpus in re* John M. Ross. Order. Filed Jan. 21, 1891. W. S. Doolittle, clerk.

24 *Copy of Files in Department of State.*

No. 2871.

UNITED STATES OF AMERICA:

DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I certify that the documents hereto annexed are true copies from the files of this Department.

In testimony whereof I, Thomas F. Bayard, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the city of Washington this 11th day of July,
[SEAL.] A. D. 1887, and of the Independence of the United States of America the one hundred and twelfth.

T. F. BAYARD.

No. 439.

UNITED STATES CONSULATE GENERAL,
KANAGAWA, JAPAN, *May 22d*, 1880.

25 Honorable John Hay, Assistant Secretary of State, Washington, D. C.

SIR: On the early morning of the 9th of May instant, on board of the American ship "Bullion," lying in the harbor of Yokohama, a seaman of said ship, named John Martin Ross, killed the 2nd mate,

Robert Kelley, with a large sheath knife, which he was not in the habit of carrying, but kept sharpened in his berth.

The accused was arrested and a sworn complaint, charging him (with murder), was filed by the master of the ship. He was duly tried in my court before myself and four associates, convicted of murder, and sentenced to suffer death at such time and place as the United States minister in Japan should direct, in accordance with law.

A certified copy of the record and evidence has been furnished Mr. Bingham for his approval, and he will doubtless communicate with the Department upon the subject. I send herewith a printed copy of the record and evidence, which, in all essential particulars, is correct.

It will be seen that the counsel for the prisoner presented three important questions:

26 First. A plea to the jurisdiction of the court, based on an affidavit of the prisoner that he was a British subject.

I overruled this plea after procuring Mr. Bingham's opinion upon the subject. My decision will be found in the record I forward. From the authorities quoted by me it would appear that the United States and England have always claimed jurisdiction over men serving on board their merchant vessels.

Of course it is admitted that the vessel on which an offence is committed being at the time in the port of another nationality, the courts of the latter would have jurisdiction, concurrent or otherwise.

In this instance the vessel was in Japanese waters. Japan has by treaty waived her jurisdiction. Query: Does not the jurisdiction rest exclusively in the United States, and is not the court established here by United States laws competent to try the offender?

I am not without doubts, and I think this important question should be put at rest by authoritative decision of the Government or by a convention between the United States and Great Britain.

The second question raised by prisoner's counsel was that the prisoner could not be called upon to answer to the charge of murder, except upon indictment or presentment of a grand jury,

27 under article five (5) of the amendments to the Constitution of the United States; and, third, that the prisoner was entitled to a trial by jury, under subdivision three (3) of section two (2) of article (3) of the Constitution.

It will be perceived that I decline to pass upon these propositions upon the ground that my court, being the creature of a statute, must act strictly in conformity with its provisions, and that all precedents under said statute in the United States consular courts in China and Japan had, as far as possible, established the mode of procedure in criminal cases.

I desire to say, also, that, previous to proceeding to try the case in question, I consulted the United States minister, and his opinion expressed to me was that the mode prescribed by the statute for such trials was not in conflict with the Constitution, and he has also written me that the trial of the prisoner in this case, before

myself and four associates, would, in his opinion, be regular and his conviction and sentence legal.

As for myself, I confess that I cannot comprehend the ingenuity by which these far-reaching provisions of the Constitution can be thus legally evaded. The counsel for the prisoner contended, not that the statute was in violation of the Constitution, but that
28 the practice was in violation of the statute. He insisted that the framers of the law never contemplated an abandonment of jury trials, and that the associates provided by the statute were only intended to act as associate judges and not in any respect as jurors.

Surely these questions are too serious and important longer to remain unsettled, and I earnestly urge upon the department the necessity of having them passed upon by competent authority, so that our consular courts in Japan may be properly advised.

Murder among American seamen in these waters has become almost an epidemic, and there exists among the foreign community in Japan an uneasy feeling, in view of the uncertainties of the law in the particulars alluded to and of the fact that no such murder has as yet been adequately punished. An almost universal regret is expressed that the man Ross was not tried in the British court, where it is confidently predicted he would have been not only condemned to death, but the penalty would have surely been inflicted.

I have the honor to be, sir, your obedient servant,

THOMAS V. VAN BUREN,
Consul General.

29 UNITED STATES CONSULAR-GENERAL COURT,
[SEAL.] KANAGAWA (YOKOHAMA), JAPAN.

John P. Reed, master ship "Bullion," on oath complains that John Martin Ross, supposed to be a citizen of the United States and within the jurisdiction of this court, at Kanagawa, Japan, on the 9th day of May, 1880, unlawfully, with force and arms, on board the American ship "Bullion," then lying in the harbor of Yokohama, Japan, in and upon one Robert Kelly, 2nd officer of said ship, then and there being, feloniously, willfully, and with malice aforethought, did make an assault, and that he, the said John Martin Ross, with a certain sheath-knife, which he held in his hand, in and upon the neck of him, the said Robert Kelly, then and there, willfully and of his malice aforethought, did strike and thrust with the knife aforesaid, causing a mortal wound, from which he, the said Robert Kelly, died a very short time thereafter on board said ship, in the galley of said ship where said wound was inflicted.

(Signed) J. P. REED.

Sworn and subscribed before me this day of May 10th, 1880.

(Signed) THOS. B. VAN BUREN,
[SEAL.] *U. S. Consul General.*

30 UNITED STATES CONSULAR-GENERAL COURT,
KANAGWA, JAPAN, *May 10th*, 1880.

I certify that I have reasonable grounds for believing that the contents of the within complaint are true.

(Signed) THOS. B. VAN BUREN,
[SEAL.] *U. S. Consul General.*

(Indorsed:) United States consular-general court, Kanagawa, Japan. Complaint. Filed May 10, 1880.

U. S. Consular-General Court, Kanagawa, Japan.

Amended Complaint.

John P. Reed, master of the American ship "Bullion," on oath complains that John Martin Ross, an American seaman, duly and lawfully enrolled and shipped and doing service as such seaman on board the American ship "Bullion," did on the early morning of the 9th day of May, 1880, on board of said ship, while lying in the harbor of Yokohama, Japan, and within the jurisdiction of this court, with force and arms, maliciously, feloniously, deliberately, willfully, and of his malice aforethought, make an assault
31 upon one Robert Kelly, the mate of said ship, and did then and there, feloniously, maliciously, deliberately, and of malice aforethought, strike and cut the said Robert Kelly with a knife, from which said Robert Kelly died on board said ship a short time thereafter. Wherefore affiant charges that said John Martin Ross willfully and maliciously killed and murdered the said Robert Kelly, and affiant further says that said John Martin Ross is still a seaman on said ship.

(Signed) J. P. REED.

Sworn and subscribed before me this 18th day of May, 1880.
(Signed) THOS. B. VAN BUREN,
U. S. Consul General.

U. S. CONSULAR GENERAL COURT,
KANAGAWA, JAPAN, *May 18th*, 1880.

I certify that I have reasonable grounds for believing that the contents of the within complaint are true.

(Signed) THOS. B. VAN BUREN,
[SEAL.] *U. S. Consul General.*

In the United States Consular General Court, Kanagawa, Japan.

32 THE UNITED STATES OF AMERICA
against
JOHN MARTIN ROSS.

Charged with the murder of Robert Kelly, late 2d officer of the American ship "Bullion." Defendant in custody before the filing of the complaint.

MAY 12TH, 1880—3 o'clock p. m.

The prisoner is brought into court.

Thos. B. Van Buren, Esq., consul general, on the bench.

Geo. W. Hill, Esq., appears for the prisoner, having been designated for that purpose by the court at the request of the prisoner.

The complaint is read to the prisoner, and he is asked to plead thereto. His counsel, however, intervenes, and presents a paper signed by the prisoner and asks that the prisoner may be sworn to the truth of its contents, which is done. This paper states that the affiant is a subject of Great Britain, a native of Prince Edward's Island, in North America, a province and dependency of the British Empire, and has never renounced the rights or liabilities of a British subject or been expatriated from his native allegiance or been naturalized in any other country.

Upon this affidavit the prisoner demurs to the complaint on the ground that the court has no jurisdiction by reason of the
33 fact that the prisoner is a subject of Great Britain.

The demurrer and affidavit are filed in court.

The counsel for prisoner then moves that the prisoner be forthwith discharged.

Motion denied.

The court states that the question raised is an important one and not to be decided without careful consideration; that two questions are involved—first, whether the affidavit of the prisoner is to be considered as establishing his nationality; and, second, whether, even if shown to be a subject of Great Britain, the fact of his being duly enrolled on the papers of an American ship, and the crime with which he is charged having been committed on the deck of such ship while in this harbor, he is not still amenable to the jurisdiction of this court; that while the impression of the court is that none but citizens of the United States can be made to answer in this court, yet, as intimated, the question is too important to be decided off-hand.

It is therefore ordered that the prisoner be recommitted, to be again brought before the court when the court shall be prepared to give judgment upon the demurrer.

(Signed) THOS. B. VAN BUREN,
Consul General.

MAY 17TH, 1880.

Prisoner present in person and by counsel.

34 Court announces that the drawing of associates is about to take place according to the statute and the consular-court regulations; whereupon the counsel for the prisoner files a motion to discharge the prisoner for want of an indictment by a grand jury, and proposes to present an argument in favor of said motion.

Argument ordered to stand over until to-morrow morning without prejudice.

The counsel files another motion to postpone the trial until 1st of November, in order to procure material evidence from abroad,

and files therewith an affidavit made by the prisoner as to such evidence.

Argument to stand over until to-morrow morning without prejudice.

Court then draws the associates, in accordance with the statutes and regulations, from ballots placed in a box containing the names of those persons selected by the consul-general and approved by the minister. The names thus drawn from the box are as follows:

F. E. Foster,
E. H. R. Manley,
F. H. Olmstead,
O. Keil.

Ordered that the four parties named be summoned to be present in court on the 18th instant, at 10 o'clock in the forenoon.

35 Adjourned until the 18th instant, at 10 a. m.

(Signed) THOS. B. VAN BUREN,
Consul General.

18TH MAY, 10 A. M.

Court met.

Prisoner present personally and by counsel.

The court announces that the associates, who have been duly summoned and who are present, will be sworn, after which the counsel for the prisoner may make his argument on his motion filed yesterday, reserving to himself all rights the same as if said argument were made now.

Associates sworn to answer questions as to their eligibility. The counsel for the prisoner announces that he has no questions to ask touching their eligibility. Associates sworn to try the cause in accordance with court regulations.

Decision overruling demurrer to the jurisdiction read.

Prisoner's counsel excepts to the opinion and decision. Counsel proceeds to argue his plea that the prisoner cannot be held to answer except upon the presentment of a grand jury.

Motion overruled on the ground that this court, being the creature of a statute, is bound to follow strictly the provisions of such statute and not go outside of it. This court feels that it has no authority to decide the questions raised, but must proceed according to the statute and court regulations, as has always been done heretofore in China and Japan. Prisoner's counsel excepts.

36 Prisoner's counsel presents his motion to postpone the trial, based upon the prisoner's affidavit. Motion ordered to stand over until the evidence now in Yokohama be taken. Exception.

Prisoner's counsel files a motion for a jury. Overruled upon the same ground as the motion for a grand jury was overruled.

Exception.

Prisoner's counsel moves to discharge the prisoner for the reason that he is entitled to a public trial by jury, and argues the motion at length. Overruled. Exception.

Amended complaint substituted for the original, no objections being raised thereto.

The substituted complaint read to the prisoner, and he is called to plead to the same. Prisoner pleads not guilty. Counsel for the prisoner asks for the names of the witnesses for the prosecution.

Recess until 1.30 p. m.

1.30 p. m., court assembled.

Names of witnesses for prosecution furnished defence. Prisoner and counsel present.

JOHN P. REED, sworn as a witness for the prosecution, says: I am master of the American ship "Bullion." The name of my 2d mate was Robert Kelly. He is dead. He died in the galley of the ship, in this harbor. He died about from between three and four o'clock on Sunday morning, the 9th instant. Between three and four
37 o'clock I was called by one of the seamen named Samuel Scott. I was in my berth asleep. Scott called me and said, Captain, come up. Jack has stabbed Mr. Kelly in the neck. I turned out, put on my clothes, took my rifle, and went forward. As I passed the galley I looked in and saw Mr. Kelly lying dead. I enquired where Jack was—John Ross, the prisoner, he went by name of Jack; was answered by one of the men that he was in the forecastle. I went to the forecastle door and called John Ross. He said, "Sir to you" and came right to the door and put his hands out for me to put the irons on. Then I took hold of him with one hand, and he seeing me with the rifle caught hold of it and said, "Don't shoot any one," and wanted to go back into the forecastle to get his jacket. I told him no; he could not go back into the forecastle any more. I told the men to take hold of him, which they did, and we put the irons on him and put him in the carpenter shop. He made a threat that he would kill the cook if he got a chance. I mean the prisoner made this threat. Then I called a sampan and came ashore to the U. S. consulate, and the consul directed me to the police station, and was taken by one of the constables to the marshal.

The deputy marshal and a constable and undertaker went with me on board. When we got on board I delivered the corpse to the undertaker and the prisoner to the marshal. When they took the prisoner past the body of Mr. Kelly, which was lying on the main hatch, some of the crew said, "Let him see him." They turned
38 the sail back and Ross said, "I can look at him every day in the week and shake hands with him, and I suppose I'll swing for it." I did not examine the body. Dr. Tripler examined the body after it was placed in the coffin. The undertaker, assisted by the crew, put the body in the coffin. The prisoner at the bar is a member of my crew. My ship is a documented American ship. The corpse was brought ashore and buried on Monday, the 10th.

Cross-examined:

I sailed from New York for this port. The accused has been on my ship all the time. The discipline is not slack nor as strict as a man-of-war on my ship; medium. My rifle is usually at the foot of my berth in my cabin on deck. I loaded the rifle the morning I

spoke of. I do not keep it loaded. The steward has access to my room. The crew may have seen my rifle while cleaning it or sometimes firing it off on the voyage. The mate had charge of the irons; always in requisition if necessary; always customary to have irons on board merchant ships—a number of pair. It is a very common thing to use them when men misbehave. I had given Ross liberty to go ashore on Saturday night until 10 o'clock, at which time he promised faithfully to return, and I gave him $5.00 in money. Of my own knowledge I don't know if he came back at that time or not.

SAMUEL SCOTT, sworn, says: I am an able seaman on the "Bullion." At half past three in the morning of the 9th—Sunday morn-
39 ing—I was going aft with a light. I saw the 2nd mate, stewardess, and cook come aboard the ship. I asked the stewardess to open the pantry door and let me get a coffee-pot to make coffee for the captain. She opened the pantry and told me, The captain will not drink coffee; make tea. The 2nd mate, Mr. Kelly, came to the pantry for something to eat. He took some beef and potatoes in two plates and took them to the galley and put them on the dresser and leaned upon the dresser with one arm while he was eating. I then saw Ross come aboard ship with a bunch of flowers in his hand. He came to the galley door and saw the 2nd mate there, eating, and said he would pay him at daylight, or something of that kind. He said this to Mr. Kelly. Then Ross walked forward into the forecastle. After awhile he came to the galley in different clothes. He came in the galley door and asked Kelly if he was as good a man as he was ashore. Kelly said, "Go away, my man; go away, my man." Then John Ross stabbed him in the neck with a sheath-knife. Mr. Kelly called out to me, "Sam! Sam!" and the blood gurgled in his throat and spurted out over my shirt and over the food on the dresser. Ross made to strike him a second time, and I left and went for the captain. I told captain "John Ross had stabbed the 2d mate." When I went back to the galley I found the 2d mate. He was lying on the floor. John Ross was in the forecastle when the captain came. I was by the door of the forecastle when Ross was brought out. One of the men asked that Ross should see the corpse before he was taken from the
40 vessel. They threw off the covering of the corpse. Ross said he would shake hands with him every day of the week.

Knife shown by the court.

Witness says: That is the knife.

Cross-examined:

I saw 2d mate, stewardess, and cook come on board together. I spoke to the stewardess. The cook went immediately to his room. It was early in the morning. Ross said he would pay Kelly at daylight; can't say how long it was before daylight at that time. I was busy peeling potatoes; did not pay particular attention; did not hear him say, "Now, Kelly, if you are as good a man as you

were ashore, come out on the main deck." Ross had pants on when he came back to the galley; can't say if he had on a shirt or a singlet; can't say he had on a blouse. He had on his old clothes; never saw Ross carry this knife before. He usually had a smaller one; am sure of that. The ordinary dress on board ship differs; sometimes a shirt, sometimes a singlet, sometimes a jacket, and different kinds of pants. It is usual to carry sheath-knives on board ship. I do not usually carry a sheath-knife; did so only for a week or a fortnight when we were rat-ling down. The galley is not a usual place for the mates to eat. The dresser is a table where the cook cuts meat. I have not been in the galley often. I did not see a carving knife at the time of the killing. I saw a long knife the 2d mate had to cut the meat—a good deal longer than this
41 knife in court. Kelly was using it to cut his meat. When the affray occurred Mr. Kelly was standing leaning on the dresser, eating. When Ross stabbed Kelly in the neck he (Kelly) fell upon my shoulder; heard Ross say nothing. All I heard Kelly say was, "Sam! Sam!" and then a gurgle in his throat. I supported him with both hands, and had blood on both hands. When I left him he had not yet fallen on the floor. I left in a hurry, and ran for the captain. Ross made an attempt to strike the second blow. I don't know if he succeeded; never saw any difficulty between Ross and Kelly before this; never heard either make threats against the other. As near as I can judge, Ross came on board about a quarter of an hour after the 2d mate and stewardess; cannot say when daylight was, but I think about a quarter of an hour after Ross came on board.

WM. THOMAS, sworn, says: I am an able seaman on board the ship "Bullion." I know the prisoner at the bar. He is one of my shipmates. I saw him on Saturday before he went on shore. Saturday morning, after breakfast, the mate came forward and turned us to work. He sent me in a lighter alongside to receive a purchase. Some time after Ross, the prisoner, came into the lighter and said, George, are you going to ask captain for your discharge again? After a little talk he said, I am going to ask for mine and also money to-night. I am bound to go ashore to-night, money or no money. I advised him not. He said, I'm going ashore; I have made an appointment. He went on shore; can't say what time; did not see him leave the ship myself.
42 I was awakened Sunday morning by hearing Ross say, "You'll pay for this by daylight." I was in my bunk asleep, in the port forecastle. Ross then came to the forecastle to me. I pretended to be asleep. He shook me two or three times. I answered him. He said, Here, George, 's a bottle of whiskey I've brought on board to be drunk. I told him I did not want any and told him to put it away until morning; he would want it himself. He drew the cork and gave it to me, and told me I was to drink it. I put the bottle to my lips, but did not drink. I passed him the bottle. He took it and gave it to another man; then he commenced to undress. Whilst he was undressing he said, "Those two sons of

whores tried to lick me on shore, but they can't do it yet;" and, pointing to his nose, he said, "See where Dutch Charley hit the top of my nose." He meant the cook. He went by the name of Charley and was the only Dutchman on board the ship. Ross took off his shore clothes and put on an old pair of working pants. He put on his belt and walked out, rolling up his sleeve—I saw a sheath on the belt; don't know if there was a knife in it—saying, "Either you or me for it." Then I heard him at the galley door say, "If you are as good a man now as you were on shore, come out here on the main deck." I heard no answer; heard Ross say, "I will cut the bloody Irish heart out you, God damn you." Then Ross came to me again, holding his knife in his right hand and holding up his left hand. He wiped his knife first on one side and then on the
43 other on the palm of his hand, and, putting his hand over to my face he said, "There's his heart's blood, George." I turned out of my bunk and ran to the galley door and saw another man turning Mr. Kelly on his back. I went back to the forecastle and took the knife from over the beam, where Ross had placed it, and stowed it away. (Knife shown.) That is the knife. Then I heard the captain say, "Where is Jack?" He (Ross) answered, Here I am, Captain Reed, and he walked to the forecastle door saying, "Put them on yourself, Captain." When he saw the captain with a rifle in his hand he caught hold of the barrel of the rifle and said, "Don't shoot anybody, Captain;" then he said, "Hold on; let me have my coat." He turned, but some one outside the door caught hold of him and hauled him back over the steps of the door on his back. The irons were put on him and he was locked in the carpenter shop. I was not present when the body was uncovered. The distance between the galley door and forecastle is about ten or twelve yards. When I went back to the galley and stowed the knife away Ross said, "If that Dutch son of a whore were on board I'd serve him the same."

Cross-examination:

Am quite certain he used the last expression. When Ross went out of the forecastle making his threats he had no knife in his hands. Ross did not usually carry his knife. He had this knife now in court. There was a sheath on his belt, which the knife fitted. He had another knife which he usually used about the ship's
44 deck. I never heard Mr. Kelly use threats against Ross. When I reached Kelly he was still alive. The only motion I saw was that his arm, which was lying on his breast, fell off. I saw two wounds; one on his body and one on his arm, left side.

He was lying inside the galley with his head toward the door. I saw the carving knife on the dresser after Ross was locked up. Bennett was there. Kelly was in his shirt sleeves—white shirt; dark vest and pants, and shoes on his feet—low, thin shoes. My true name is William Thomas. I go by the name of George on shipboard. When Ross spoke about going on shore said he was going to meet her. When Ross came on board his face seemed to be scarred slightly—on his right cheek and tip of his nose. He had

blood on his shirt and collar and vest. Ross showed no temper or passion further than in the use of the words I have stated.

Redirect:

Ross was not drunk when he came on *d*oard.

Recross:

I have never seen him drunk. I mean a man is drunk when he stands with difficulty.

Redirect:

When I say he was not drunk I mean he was sober and apparently knew what he was about.

This last answer was in response to a question embodying it which was put by the court. Counsel for prisoner objects
45 to the question. Overruled. Exception.

CHARLES BROWN, sworn, says: I am the cook on the "Bullion." I was on shore on the night of the 8th—Saturday night. I saw the prisoner on shore. I saw Mr. Kelly, the 2d mate. I saw them at Mrs. Glass'—the Shamrock—about 9 o'clock. Ross came in there, and we took a drink together; then we had a game of cards. Kelly came in, and he called me one side and said, "I am going to lick John Ross to-night." I asked him what for. He said, That is none of your business; that's between me and him. After awhile Ross went out. I said, It's better we should go to the ship. Kelly, myself, and the stewardess went out and went down to the batoba, and while we were there John Ross came, and Kelly said, There's John Ross now. Kelly then pulled off his coat. When John Ross came he made for Kelly and shoved him down on the ground. I said to Ross, "No fighting here." I caught hold of him and pulled him off. Then Ross made for me and called me out of my name and hit me in my stomach. I fell on the rocks and bruised my knee and leg. I then said to Kelly, Let us go down to the ship. After Kelly got up he made for Ross; got him down and beat him and kicked him with his feet. I said to Mr. Kelly, Let us get down to the ship now. Kelly said, No; Ross is going, and there will be a disturbance and get all hands awake. So we went to several public houses, the last one being the California. There we met the chief officer of the "Charles Dennis." We sat there until two or three o'clock;
46 can't tell exactly the time. Then we went together on board, leaving the mate of the "Charles Dennis" at his ship. When I got on board I turned in. I saw Mr. Kelly's body the next morning in the galley; was not present when the body was shown to Ross.

Cross-ex.:

I had a few drinks—one brandy, 2 gin, and lemonade. I was sober. My recollection is good of all that took place that evening. Ross and myself had a little disturbance at Mrs. Glass'. Kelly, the stewardess, and myself *when* off by ourselves; not with Ross; next

saw Ross at the California. I did not tell this at the inquest or to the court in my direct examination. A woman—Mrs. Burns—keeps the California. A daughter of hers was there. The first time I saw Ross that night was at Flint's, a drinking-house. I drank with Ross there; have not told this before; did not see Kelly at Flint's talking to another man; did not anywhere hear Kelly talking to another man about taking his, Kelly's, place. The name of Flint's place is the Richmond. The stewardess came in there afterwards; did not drink there with Kelly. Ross told me he was going on board ship at 10 o'clock. When I went out of the Richmond I went alone, leaving Ross. When I arrived at the Shamrock did not find Ross there. The stewardess was at the Shamrock. She went to Flint's to get a jacket she had left there in the morning.

When she came back from Flint's I think she came with
47 Ross. They came to the Shamrock the same time I did.
The stewardess was not at the Richmond when I was there. She sent me for the jacket from the Shamrock. When Kelly, myself, and stewardess came from the hotaba we went to a house kept by a Japanese; don't know where that is; drunk there. We went to the California House; took several drinks there. It was about one hour and a half before we reached the California; was in the Japanese house before. We had a private room in that house for drinking in. I had only a glass of lemonade. The California was open when we went there. They were just about closing. Two mates were there. We staid there, I should think, about one and a half or two hours. We had a private room. I did not see any one come in while we were there. Ross was at the California when we went there, and the two mates I have mentioned. Ross did not come into our room. He staid in the bar-room, where he was when we came in. The door of the private room from the bar was closed. When we came in Ross caught me by the shoulder and said, "What have you been doing with me?" He said he had a wound on him. I had on the same boots I have on now. Ross' wounds were in the face. I mean that Ross, when he caught hold of me, said, "What they have been doing to me." It was not a question, but showing me what his bruises were. Kelly had gone into the private room. I stopped a moment to speak to the mate. I knew the mate. He

said, How do you do, Steward? I was only talking with him
48 a moment. Ross was there. In the fight at the hatoba I
took nobody's part. I pulled Ross off of Kelly. The squabble was about five or 10 minutes. The stewardess said to me, "Come; they are going to fight," and she walked away a little ways. When Kelly got up he knocked Ross down and kicked him and beat him. I was standing with my wife, who had called me. Ross was lying on his back, I think, when Kelly kicked him; can't tell where he kicked him in his body and side. Ross called for police. Kelly said to me, If you get me off I will lick you. The stewardess was away about as far as the door of this room from me. I saw no pulling of hair.

Adjourned until to-morrow morning, 10 a. m. (19th inst.)

T. B. V. B.

19TH INST.

Court met.
Prisoner and counsel present.

THOMAS H. TRIPLER, sworn says: I am a practising physician and surgeon in Yokohama. I was on board the Am. ship "Bullion" on the morning of the 9th inst. I heard there had been an accident there, and, being retained by the vessel, I went on board. I saw the body of the late 2d mate lying in a coffin on deck. I examined the wounds. There was a wound of about four inches across the left fore-arm which exposed the bone; also a superficial wound on the left cheek and a deep wound in the neck. This wound in the neck was about three inches in extent and divided the muscles and superficial structures; also the left common carotid artery and the left jugular vein. In my opinion death was caused by hem-
49 orr-age from the vein and artery thus cut in the neck.

Cross-ex.:

The ulner artery was severed by the wound in the arm.

Q. Had there been no wound in the neck such as had been described would not the hemmor-hage from the cut ulner artery in the arm have been sufficient to cause death without prompt care?

A. Hemmor-hage from the ulner artery is apt to be serious, but it is very easily prevented by pressure; sometimes it will cease spontaneously, but in some instances, if not cared for, the party may bleed to death. A patient with the ulner artery cut by a sharp instrument and nothing to impede the flow of blood would probably bleed to death if not attended to. I think it would take about an hour for death to ensue. From the direction of the wound on the neck all the jugular veins must have been severed. I did not probe the wound in the neck; it was evidently made by a knife or a sharp instrument—the wound on the neck on the left side.

Q. If such a wound was given to a man standing up what would be the effect? Would not the wounded man immediately collapse?

A. He would not fall suddenly, as if from a wound on the head, but would probably collapse within half a minute. The wounded man, under such circumstances, would be able to exercise some movements with his arms for a few seconds. The wound on the arm and also on the neck were evidently made by a sharp instrument, but not sharp like a razor, as both wounds were some-
50 what jagged and torn. The wound on the arm was in the inner side of the left arm. (The witness illustrates the position of the arm, showing the arm raised, as if warding off the blow.) It would hardly be possible for the wounded man, upon receiving the wound in the neck, to have accidentally made the wound in his arm by a knife held in his right hand. A man could almost instantaneously raise his arm to ward off a second blow after the wound in neck. The most reasonable supposition is that the wound in the arm was received first, but it could have been received after the wound in the neck. I have no knowledge of which wound was received first. A man thus wounded in the neck could probably speak

intelligently a part of a minute. The length of time he might live after such a wound would depend upon the position of the neck and how the man should fall; with the neck turned the hemmorhage might be retarded.

JOHN COYLE, sworn, says: I am a naval seaman on the "Bullion." I know the prisoner. He was one of my fellow-seamen on the "Bullion." I saw him on the forecastle on Sunday morning, the morning the 2d mate was killed. At half past three on Sunday morning Ross came to my bunk sick, and touched me on the left shoulder to get up and have a drink. I got up and he had a ginger-beer bottle full of whiskey. He was beating the bottle on his left hand to get the cork out. He could not get the cork out, so he passed the bottle to me again. I went to my bunk and got a nail
51 and took the cork out. I gave him the bottle and he took a drink out of it and passed it to me and I took a drink. I then passed the bottle to James Bennett, lying in his bunk. Then Ross came to me and took me by the right hand and put my hand up to feel some bruises he had on the top of his head. I asked him who had been doing it and he said Mr. Kelly and Dutch Charley, ashore. Then he showed me where he said the cook had bitten him on the nose. His nose was scarred. Then he said, "Those two sons of whores have beat me ashore, but they can't beat me yet." Then I went to my bunk. Ross changed his clothes and said he was going out on deck. Then I heard him at the galley door saying to Kelly, "If you are as good a man now as you were on shore step out on the main deck." I heard no reply from Mr. Kelly. I heard John Ross then say that he would cut the Irish heart out of him "and that Dutch son — a whore, if he was on board, too." I did not see him again until he came abre-st of my bunk again. My bunk was below the prisoner's. He took his left hand and wiped his knife on the palm, and showing his hand to Thomas, who we called George on board, and said, "Look, George, there is his heart's blood." George jumped up from his berth and said, "By God, he has done it," and he went out. I went after him. When I went to the galley door I saw Mr. Kelly lying on his back on the floor, with his head toward the door. I came to the forecastle again and Ross was standing by his berth, about to turn in. He said to me, "Those
52 sons of bitches." I stopped by his side until the captain called him, when he went to the door, and, holding out both hands, he said, "Here y[illegible]re, Capt. Reed; shove them on yourself." When he saw the capt[illegible] have a rifle he seized it by one hand and told the captain not t[illegible]hoot any one. Then he said to Capt. Reed, "I want you to get my coat." George took his coat and hove it out to him. He was tumbled down on deck by the forecastle door until the irons were put on. We got him upon his feet and walked him back of the galley. The captain then said he was not going to keep him aft. Then we took him forward again and put him in the carpenter's shop. He asked me for a smoke and water. I told him I could not do so until I got the keys. The chief mate came and gave him some water. (Knife shown.) I have seen this knife before in

the forecastle, sticking underneath the beam. It belonged to the prisoner. I never saw him work with it about the deck. He probably kept it as a stand-by in case he should lose the others. Sailors generally have two for that purpose. I have seen him sharpen it once or twice and put it on the beam again. I have probably used it oftener than he has to cut tobacco. When Ross came into the forecastle that morning he was a little under the influence of liquor; not far gone in it; just lively; probably had five or six glasses in him.

Cross-ex.:

Never have seen this knife carried in a sheath. It could
53 go in a sheath on the belt. The knife he generally carried goes in his sheath, as it is about as large as this.

Direct:

This is the knife he wiped upon his hand and showed the blood in the forecastle.

JAMES BENNETT, sworn, and says: I am an able seaman on the Bullion. I know the prisoner. He was my shipmate and watch-mate on the Bullion. I saw him on the morning of Sunday, the 9th, on the ship. I had the anchor watch that morning from two to three. About three o'clock I called John Collins. When he came on deck I went below and turned into my bunk. After turning in I felt restless, and nearly four o'clock I heard Ross on deck saying, "Kelly, you'll pay for this at daylight." He then came into the forecastle. He turned the light on. I saw he was all disfigured with blood, &c. He had a small bottle—a ginger-beer bottle—with liquor. He passed it to John Coyle to open. He commenced telling us how Kelly and the cook had been beating him on shore. He said there were three. During the time he was telling this he undressed himself of his store clothes and put on a common working suit he used every day. He then took one drink out of the bottle he had brought and took his belt and sheath and tied it around him. He then went towards the door, rolling up his sleeves and saying, "Now, you or me for it." A minute after or less I heard Ross say,
"Kelly, if you are as good a man as you were, come out
54 on deck." Did not hear anything until I heard Ross' voice again saying, "I'll cut the Irish heart out of you, you son of a bitch." Directly afterward he came into the forecastle. I saw a knife in his right hand, and he commenced wiping it, as he came in, on his left hand and said, "Look there; there's his heart's blood." He walked towards his bunk and stuck the knife in the beam overhead. As soon as I saw him do so I jumped out of my bunk. I ran to the galley; when I arrived there I saw nobody until I looked on the floor. I saw Kelly, 2d officer, lying face downward. I jumped aside, took hold of him and turned him on his back. One of the other men came along, and I said, "Go and fetch the captain or mate, quick." On turning Mr. Kelly over I saw a large carving knife lying underneath him. I took hold of it, held it up to the

light, and then threw it on the cupboard. Just after doing so Ross came to the galley again; says he, "I told you I'd fix you for double-banking me." That term is used to mean that two men pitch into one. He made no demonstration towards striking him. I jumped upon my feet and said, "Go away, Jack. I never thought you would do this." I said, "You have killed him." He turned and walked to the forecastle. Directly afterwards I saw the captain come forward, armed with a rifle, and some of the men with him. He looked in at the galley door and then went forward to secure Ross. I came out on deck and afterwards went into the galley until they
55 all came and had a look at Kelly. I said, "He is past all cure now," or something to that effect. After Ross had been ironed he was put into the carpenter's shop. He asked for water, which I brought to him. Ross said, "That Dutch whore is the cause of all this; after last night I know what she is." When the marshal came on board Ross was given into his custody. As he went by where Kelly laid he said, "Now I can shake hands with you any day in the week." He was passed over the side; and after shifting moorings Mr. Kelly's body was passed over.

Ross was under the influence of liquor when he came into the galley that morning—half drunk.

Cross-examined:

There was a sheath on the belt when Ross put on his working suit; the belt is used to keep up the pants; sailors do not wear suspenders. When he went out of the forecastle he had no knife in his hand, but was rolling up his sleeves in an excited manner.

The knife I picked up under Mr. Kelly was a long carving knife. Kelly lay face downward, close to the dresser, and the carving knife was under his body, not more than two feet or a foot and a half from the dresser. I held the knife up to the light; there was no blood on it.

Q. Supposing Kelly held the carving knife in his right hand when he received a mortal blow in his neck, and fell in such a position that the knife was found under his body, in such a
56 case do you think the wound in his left arm may have been given by the knife in his (Kelly's) right hand on falling?

A. No, sir; I do not think it. I held the knife up to the lamp—between me and the lamp—and turned it, and saw no drop of blood. After I threw the knife on the dresser I took no further notice of it, although I saw it lie there.

Evidence for the prosecution closed.

Recess until half past one o'c.

1.30 p. m., court assembled.

Court announces that it has just been put in possession of the fact that one of the men on the ship is prepared to testify that he went into the galley just after the stabbing took place and supported the wounded man, and in doing so knocked off the dresser the carving knife that was found under the body of Mr. Kelly, and the court proposes to reserve the right to call that witness at the next meeting of the court.

Counsel for the prisoner states that under the circumstances he does not feel at liberty to consent to such reservation. Court thereupon waives the examination.

Defense.

Counsel for prisoner proceeds to argue. Motion to postpone. Motion overruled for the present. Exception. Motion to postpone for one month by counsel for prisoner filed on the ground that an impartial trial of accused cannot be had at this place and at
57 this time, and also filed affidavit of prisoner in support of motion.

Motion overruled. Exception.

GEO. W. ELMER, being sworn, says: I brought the prisoner at the bar over from the ship to the jail on the morning of Sunday, the 9th inst., last. I examined the prisoner after I got him ashore and found a slight cut across the end of the nose and an abrasion of the skin underneath the nose, torn-like; his right eye blacked pretty severely; that was all I noticed on Sunday. On Monday I saw the owner marks. I had him examined by Dr. Simmons, the medical officer of the jail. He had a scar on his left knee; quite a large one, as large as half a cent. There were several bruises on his back from his shoulder to his loins; less on the right side, more on the left side. Those bruises were about two inches long, from a quarter to a half inch in width. They were all of a general resemblance; something the shape of the toe of a heavy boot. He had a lump on his head. The discolorations were not black and blue. They had a reddish look. The wounds were vertical. The other marks on his head, on one side, I forget which, looked as though pins had been stuck in or hair pulled out. When I went on board the ship I saw several of the members of the crew and the body of the man who is dead. I only noticed that Mr. Kelly wore low shoes. I noticed Brown's (the cook) shoes when he was in court yesterday. I could not say which were the heavier, Kelly's or Brown's.

58 KUMA ISHIKAWA, Japanese, being warned to speak the truth, examined through an interpreter, says he saw a fight on the night of the 8th inst. on the hatoba. There were one woman and three men engaged in it—foreigners. I don't know the face of the woman. I think it was about ½ past eleven at night. The fight was underneath the ladder of the lamp-post near the end of the hatoba. I was sleeping in my boat and heard the sound of jinrikshas coming down the hatoba. There were people in the jinrikshas; one was a woman. There was one person, don't know which, walking in front of the jinrikshas. Two men and one woman got out of the jinrikshas. Shortly after they got out of the jinrikshas I saw them fighting, but did not see how they commenced. Two men were fighting. One caught the other by the beard on the chin and threw him down on the stones. The third man then put his hands on the box around the lamp-post and jumped on the man who was on the ground with his feet. Both were on him at once. The man who

was underneath on the ground appeared to be insensible. The woman went to the man who was jumping on the man who was on the ground, called out to him by a name—I don't recollect the name—and took hold of him as if to pull him away. The woman pulled him, but he did not seem to want to give in, and finally the woman kissed the man who was doing the jumping, when he stopped. Then the woman and two men got into jinrikshas and went away,
59 leaving the man who was down. The prisoner looks very much like the man left on the hatoba, on the ground. The man who was on the ground afterwards got up, with apparently much difficulty, and stood as though he was thinking. There were some scavengers on the hatoba, from whom the prisoner got a lamp and came down to witness and showed witness his bruises. He took hold of the witness' clothes and urged him to examine his wounds. I did not do it, because he was bloody. I had a casual look at the man to satisfy him. There was but one man who fell that I saw. I did not see them get out of the jinrikshas. I heard one calling for a sampan; then I got up. I saw one man get out of the jinrikisha near the post-office boat and go down to the house of the Yokoska boat. I think that man was the prisoner. I did not see the first of the fight. I heard loud voices and went up on the hatoba.

WALTER LOXTON, being sworn, says: I am sergeant of police. On Sunday morning I went to the hatoba. I saw the last witness, who told me there had been a fight there the night before. I found some hair and blood on the hatoba. I went at about ½ past ten to the place pointed out by the last witness as the place of the fight and found a great quantity of hair and a small pool of blood, about six inches or a foot from the metre box. The hair was scattered about. I have never seen the prisoner since that time.

JOHN P. REED, sworn, says: Mr. Kelly, the mate of my ship
60 who was killed, I think, had a smooth face and a moustache; am not certain if he had a moustache. I do not know if Mr. Brown had a beard on his chin.

ALFRED STANLEY, sworn, says: I know the cook, Brown. He has no beard on his chin. He might have a slight one; think not. Mr. Kelly had a chin beard; it was light auburn; it was not like this shown to me. Mr. Brown's moustache is light; not like this shown to me. I was on shore Saturday night, the 8th inst. I saw Mr. Kelly and the prisoner that night on shore. I was in a house kept by Mrs. Glass. Mr. Kelly was not in this house. I was there about an hour. I saw Mr. Brown there. Kelly was not there while I was there. I saw a difficulty arise between the prisoner and Brown, the cook, at about 9 o'clock. I was at Mrs. Glass'. I should say, between 8 and 9. I knew one thing, that John Ross and Mr. Kelly had no ill feeling to each other previous to that time. I know likewise that there has been from the first of the passage an ill feeling between the cook and Ross, and I've got my reasons, same as my shipmate, why that feeling existed. I know that it was nothing but extreme jealousy of Mr. Ross towards anybody who interfered

with the stewardess that led to the killing. Mr. Kelly told me to go into Mrs. Glass' and tell the stewardess that he wanted to see her. I went in at his request, and saw John Ross, the stewardess, and Mr. Brown in the house in the bar-room. I told the stewardess
61 that Mr. Kelly was outside waiting to see her. The steward, Brown, asked me to have a glass of anything I liked. Ross had his coat off at the time, challenging the cook to come outside and fight, using very obscene expressions at the time. I tried to pacify him, but was unable to do so. I then asked the stewardess what kind of a women she was, going ashore with her husband, making two appointments with two different men, one of them in the house and the other waiting outside in the street to see her. I opened the door to see if Mr. Kelly was outside, and when I came back I heard the stewardess say that she loved the man Ross better than she did her own husband. I was with Kelly in the Centennial. I heard no threats made by Mr. Kelly.

Cross-examination:

I did not hear Ross make any threats against Kelly. I heard Ross say, "What the hell is Kelly doing around here?"

The counsel for the prisoner excepts to the withdrawal of the question asked by the court, viz: "Did you not state to me, and did I not take it in writing, that you had heard Ross make a statement like the above?" Question withdrawn and counsel excepts to withdrawal. Counsel calls attention to the fact that the hair produced in court was pulled from the chin of the prisoner, being of the same color.

HARRIET BROWN, being sworn, says: I am the wife of the cook. I was present on the hatoba about ten days ago at a fight in
62 which Brown, Kelly, and Ross were engaged. I saw the whole of it. I saw that Mr. Kelly had his jacket off when Ross came down to the hatoba. I heard Mr. Kelly say, "There is John Ross." He said, "If that is John Ross, then I am going to lick him and kill him and throw him into the water." I said, "No, Mr. Kelly, no, no do that." He said to me, "That is nothing to do to you; it is between me and Ross," and before Mr. Kelly called me one side. I was in a house and — called me in a room and my husband. I got something. To John Ross he said, "I want to lick him to-night for that." This was at a house in the town. John Ross came on the hatoba, and as soon as he stepped out of the jinriksha Mr. Kelly put his arm around him. I cannot say who was down on the ground first. Mr. Kelly sang out, "Charley, help me," to my husband. My husband went to John Ross, got hold of him, and Ross gave him a kick, and he (Brown) fell down. I got frightened and ran away, and then Mr. Kelly sang out again, "He murder me." I went back again to the fight and got hold of John, but I could do nothing; that is all I know. I did not hear any one say, "If I had had charge of you I would have put you overboard long ago."

MARY GLASS, being sworn, says I saw the prisoner, a week last Saturday, in my house. I saw Mr. Kelly that night. They were the best of friends. I saw no passages between them. Nothing was said to me by either, of his feelings towards the other. I do not know the cause of the difficulty.

63 Defense closed.

Court adjourned until the 20th May, at 10 o'clock a. m.

20TH MAY, 10 A. M.

Court again met.

Prisoner and counsel present.

Prisoner's counsel was asked if he had anything further to present before the judgment of the court should be pronounced, and, having replied in the negative, the following judgment was pronounced by the court:

In the U. S. Consular-General Court.

Before Gen. T. B. Van Buren, consul general; Messrs. Foster, Keil, Manley, and Olmstedt, *assessors*.

THURSDAY, *May 20th*, 1880.

THE PEOPLE OF THE UNITED STATES
vs.
JOHN ROSS, Sailor of the American Ship Bullion, who is Charged with Having, on the 9th inst., Murdered the 2d Mate of that Ship, Robert Kelly.

Adjourned from yesterday.

Mr. Hill defended the prisoner.

The court to-day rendered the following

Judgment and Sentence.

Prisoner, you have had a careful and, as the members of the court believe, an impartial trial, and you have been defended by able
64 and zealous counsel, who has done everything possible in your behalf.

The evidence shows that on the evening of the 8th of May instant you were ashore and a portion of the time in company with Robert Kelly, the second mate of your ship. During this time bad blood was engendered between you, which resulted in a fight at the hatoba, in which you appear to have received a number of bruises and injuries. Some three or four hours after this you went on board your ship, the Bullion, and seeing your victim in the galley eating his supper you stopped at the door and threatened him with your swift coming and merciless vengeance. You then proceeded to the forecastle and, showing your comrade your bruises, you cursed the alleged authors of them and boasted of your coming deed of blood. You deliberately removed your clothing and put on your every-day suit and, buckling about your waist the belt and sheath in which

you placed the large and well-sharpened knife, which you kept only for special occasions, you left the room, rolling up your sleeves and announcing that the time had come for exacting your revenge. You then proceeded to the door of the galley and called Kelly to come upon deck. He not heeding, you cursed and derided him and threatened, in foul terms, to cut his heart out, and then, without a moment's pause, you jumped upon him and thrust your knife into his neck, causing the blood to spurt over your comrade, who was working in the galley over the dresser, and to stream down
65 over the clothing of the stricken man; and then, your vengeance not satisfied with his life, upon the body of this dying, defenceless man you struck with your knife repeated blows.

Then going out of the galley for a moment you returned to the door to gloat over your deed and mocked at the victim you had done to death. You then went again to the forecastle and, wiping your bloody knife upon the palm of your hand, you held the latter before your shipmates and bid them look upon the heart's blood of the murdered man.

During all this time you were self-possessed, calculating, deliberate. You were not drunk, but had swallowed just enough of the vile compound sold in the dens of Yokohama to fit you for the deed you contemplated.

A more deliberate, foul, and malicious murder it would be difficult to conceive.

The court accordingly convicts you of the murder of Robert Kelly on the morning of the 9th of May instant, in the galley of the American ship Bullion, while at anchor in the harbor of Yokohama, as laid in the charge, and you are sentenced to suffer death in such manner and at such time and place as the U. S. minister in Japan may direct according to law, and may God have mercy on your soul.

(Signed) THOS. B. VAN BUREN,
Consul General, Judge of the Court.

66 We concur.

(Signed) F. E. FOSTER,
O. KEIL,
F. H. OLMSTEDT,
E. H. R. MANLEY,
} *Associates.*

After the delivery of the judgment and sentence the prisoner stated that he had no recollection of what he did that morning. He said, "I don't remember anything about it; if I did I would own up."

The counsel for the prisoner gave notice of his intention to appeal.

Court adjourned.

(Signed) THOS. B. VAN BUREN.
Consul General.

United States Consul-General Court, Kanagawa, Japan.

UNITED STATES
vs.
JOHN M. ROSS. } *Ex Rel.* JOHN P. REED.

Now cometh into court the above-named John Martin Ross, and, having first heard read the charge herein, he demurs to the said charge and says that this court ought not to take cognizance of
67 the offense charged against him, and that this court has no jurisdiction over him, the said John Martin Ross, to hear or to try the charge herein made against him, because, protesting that he is not guilty of the same, none the less the said John Martin Ross says that he is a subject of Great Britain, and this he, the said John Martin Ross, is willing to verify. Wherefore he prays judgment of this court will or ought to take cognizance of this charge, and that he may be dismissed and discharged by the court.

(Signed) JOHN MARTIN ROSS.

(Signed) G. W. HILL,
Counsel for Accused.

In the U. S. Consular-General Court.

Before General T. B. Van Buren, consul general, and Messrs. Foster, Keil, Manley, and Olmstead, associates.

TUESDAY, *the* 18*th day of May*, 1880.

The case of John Martin Ross, charged with the murder on board the Bullion, was continued.

Mr. G. W. Hill appeared for the accused, as before.

After the associates had been duly sworn the consul general read the following decision upon the point raised by Mr. Hill, that the court had no jurisdiction to try the case, the accused being a British subject.

68 The question raised by the learned counsel for the prisoner affects the interests not only of the prisoner at the bar, but of all who may hereafter be similarly situated. I have therefore given it all the consideration that the time and my limited references have rendered possible. I find by the authorities that both the United States and Great Britain have ever held in jealous regard their jurisdiction over seamen sailing under their respective flags.

Wheaton, in his "Elements of International Law," an authority universally recognized, says (page 164): "In the early disputes between the two governments on this long-contested topic" (referring to the impressment of seamen from American vessels) "the distinguished person to whose hands were first intrusted the seals of the Department of State declared that the simplest rule will be that the vessel being American shall be evidence that the seamen on board are such. Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration of the whole subject when the passions were laid and no present interest or emergency existed to

bias the judgment had convinced the American Government that this was not only the simplest and best but the only rule which could be adopted and observed consistently with the rights and honor of the United States and the security of their citizens. That rule announced, therefore, what would hereafter be the principle maintained by their Government. In every regular docu-
69 mented American merchant vessel the crew who navigated it would find their protection in the flag which was over them." Again (on page 174) he says: "The judicial power of every independent State then extends, with the qualifications mentioned" (treaty qualifications), "1st, to the punishment of all offences against the municipal laws of the State, by whomsoever committed, within the territory; 2nd, to the punishment of all such offences, by whomsoever committed, on board its public and private vessels on the high seas and on board its public vessels in foreign ports; 3rd, to the punishment of all such offences by its subjects, wherever committed; 4th, to the punishment of piracy and other offences against the law of nations, by whomsoever and wheresoever committed." And again: "Thus offences against the laws of a State prohibiting or regulating any particular traffic may be punished by its tribunals when committed by its citizens in any place, but if committed by foreigners such offences can only be thus punished when committed within the territory of the State or on board of its vessels in some place not within the jurisdiction of any other State."

In "The Queen *v.* Anderson," reported in vol. 1 of the "English Law Reports of Crown Cases Reserved," page 16, the doctrine is forcibly maintained by all the judges to whom the question has been referred that the courts of Great Britain had jurisdiction over and British law prevailed in regard to all offences committed
70 on board British merchant ships, by whomsoever committed. In this case an American citizen, serving on board a British ship, caused the death of another American citizen, serving on board the same ship, under circumstances amounting to manslaughter, the ship at the time being in the river Garonna, within French territory, at a place below bridges and where great ships went. The French authorities refused to take jurisdiction. The court in banco held unanimously "that the ship was within the admiralty jurisdiction" (of Great Britain), "and that the prisoner was rightly tried and convicted at the central criminal court."

In the opinions of the judges in this case, several American cases holding the same doctrine are quoted approvingly. Said Blackburn, justice: "The expression 'British seamen' may mean one who, whatever his nationality, is serving on board a British ship," and again it has been decided that a ship which bears a nation's flag is to be treated as a part of the territory of that nation. A ship is a kind of floating island;" and in reply to a suggestion from the counsel for the prisoner following the above from Mr. Justice Blackburn, that "if the ship floats into the territory of another nation it would cease to be so, and the jurisdiction of the flag would then be excluded, and this case might have been tried in France." Bovill,

chief justice, said: "Even if it might, why should not this country regulate the conduct of those on board its own vessels so as to
71 have concurrent jurisdiction?" The chief justice also said: "There are many observations to be found in various writers to show that in some instances, though subject to American law as a citizen of America and to the law of France as being found within French territory, yet that he must also be considered within British jurisdiction as forming a part of the crew of a British vessel, upon the principle that a country is presumed to have control over its vessels, though they may be in ports or rivers belonging to another nation." The decisions of the U. S. courts in "Thomas *v.* Lane" and the "U. S. *v.* Coombs" support this doctrine. It would seem to me useless, had I a full law library in my possession, to quote further to establish a doctrine that will probably not be disputed. The difficulty, however, that presented itself to my mind when the demurrer was filed in this cause was whether the U. S. consular courts in this country, created under a treaty, by laws passed in pursuance thereof, could hold to answer any but American citizens; and, in view of the importance of the question and of its national character, I considered it my duty to ask the opinion of the United States minister in Japan. He has kindly given me his opinion, in which he maintains that by our existing treaty with Japan, and the statutes of the United States enacted to carry the same into effect, the exclusive jurisdiction to try this prisoner is in this court. In deference to this opinion, although my mind is not entirely free from
72 doubt upon the question, I have concluded to maintain the jurisdiction already assumed.

I suppose that the plea which has raised this question of jurisdiction might have been overruled without going into the merits of the question at all, as a demurrer must state causes appearing on the face of the complaint. As I have said, however, I have deemed the point of too great importance to be passed over in that way.

The demurrer is overruled and the prisoner ordered to plead for the complaint.

(Signed) THOS. B. VAN BUREN,
Consul General.

Consular-General Court of the United States for Kanagawa, Japan.

UNITED STATES
vs.
JOHN MARTIN ROSS. } *Ex Rel.* JOHN P. REED.

John Martin Ross, named above, being first duly sworn, on oath says that he is about twenty-eight years of age and is a subject of Great Britain; that he is a native of Prince Edward's Island, in North America, a province or dependency of the British Empire, and that he has never renounced the rights or liabilities of a British subject or been expatriated from his native allegiance or been
73 naturalized in any other or foreign country.

(Signed) JOHN MARTIN ROSS.

Subscribed and sworn to before me, at Kanagawa, this 12th day of May, 1880.

[SEAL.] (Signed) THOS. B. VAN BUREN,
U. S. Consul General.

In the United States Consular-General Court at Kanagawa, Japan.

THE UNITED STATES
vs.
JOHN MARTIN ROSS. } *Ex Rel.* JOHN P. REED.

And now comes the accused above named, John Martin Ross, by G. W. Hill, his counsel, and moves and prays the court to dismiss the charge and complaint herein for the reason following, to wit:

That he, the said John Martin Ross, ought not to be held to answer for the crime or offence charged herein unless and except upon a presentment or indictment of a grand jury, and that no such proceeding has been had herein.

(Signed) G. W. HILL,
Counsel for Accused.

May 17th, 1880.

74 In United States Consular-General Court, Kanagawa, Japan.

UNITED STATES
vs.
JOHN MARTIN ROSS. } *Ex Rel.* JOHN P. REED.

Now comes the accused herein, John Martin Ross, named above, by his counsel, G. W. Hill, and moves the court and prays that the trial of the charge herein be postponed for a period of five and a half months or until 1st November, 1880, to enable the said John Martin Ross to procure the testimony of witnesses residing severally in Prince Edward's Island, North America; in the States of Maine, Massachusetts, New York, and California, of the United States, and in the Province of Nova Scotia, North America, testimony which is material and necessary to the defense of the accused and without which he cannot safely proceed to trial.

(Signed) G. W. HILL,
Counsel for Accused.

May 17th, 1880.

In United States Consular-General Court, Kanagawa, Japan.

THE UNITED STATES
vs.
JOHN MARTIN ROSS. } *Ex Rel.* JOHN P. REED.

John Martin Ross, being sworn, on his oath says that he
75 is the person named in the charge herein; that he is a native of Prince Edward's Island, North America, and is a subject of Great Britain; that he is not prepared at this time for the trial of the charge herein made against him, and cannot be prepared until he has procured the testimony of persons who are now without the

Empire of Japan, at great distances from here, and who are hereinafter named; that said persons are residing severally in Prince Edward's Island aforesaid, in the States of Maine, New York, and California, in the United States, and in the Province of Nova Scotia, North America, and that it will require a period of several months to procure such testimony; and the affiant says that if time is granted him for the purpose he expects to procure such testimony. He expects to prove by persons who have known him from childhood, to wit, by John Nicholson and by his wife, Euphenia Ross Nicholson, and by Euphenia Ross, the mother of the accused, each of whom are residing in Dorchester street, in Charlottetown, Prince Edward's Island aforesaid, that he, the accused, has from an early period of his life been subject to fits and periods of delirium and insanity, during the continuance of which the accused has been totally unconscious of his own acts and incapable of discerning their effect and character; and he says that he expects to prove by the testimony of the said John Nicholson, the said Euphemia Ross Nicholson, and the said Euphemia Ross, and by the testimony of Charles Smith, residing at No. 15 Hamilton street, New York city; by that of one Jugles, 76 residing at Machias, in the State of Maine; by that of one Hooper, residing at Rockland, in the State of Maine; by that of one Horner, master of ship "Edith," and residing in Yarmouth, Nova Scotia, in North America; by that of one Duryee, master of ship "St. Cloud," and residing at Yarmouth aforesaid; by that of Donald Martin Ross, the brother of this affiant, and, as he believes, residing in San Francisco, California, and by that of one Gardenier, residing at Chelsea, in the State of Massachusetts, that the accused has in years past and prior to this time has several such attacks of insanity and delirium as is above described; and the affiant says that this application is not made for delay, but that the testimony described and which he expects to procure is material testimony and is essential and necessary to his defense, and that he cannot safely proceed to his trial without such testimony.

(Signed) JOHN M. ROSS.

Subscribed and sworn to before me, at Yokohama, this 17th day of May, 1880.

(Signed) THOS. B. VAN BUREN.

77 *Subpœna.*

Criminal action.

In the United States Consular Court for the Port of Kanagawa, Japan.

THE PEOPLE OF THE UNITED STATES OF AMERICA
against
JOHN MARTIN ROSS.

The People of the United States of America to F. E. Foster:

You are commanded to appear before the U. S. consular court for

the port of Kanagawa, Japan, at the court-room of said court, in the U. S. consulate building, on the 18th day of May, 1880, at 10 o'clock a. m., as a- associate in a criminal action prosecuted by the people of the United States of America against John Martin Ross on behalf of the people of the U. S.

Given under my hand and the seal of this court this the 17th day of May, A. D. 1880.

(Signed) THOS. B. VAN BUREN,
[SEAL.] *Consul General.*

(Indorsed:) No. 112. U. S. consular court, Japan. People
78 of the United States against John Martin Rodd, defendant. Subpœna. Filed. (Signed) Geo. E. Rice, consular court clerk. Office of U. S. marshal, Kanagawa, Japan. I hereby certify that I served the within subpœna on this 17th day of May, A. D. 1880, on F. E. Foster, witnesses named in said subpœna, at Kanagawa, Japan, by showing the original to him personally and informing him of the contents thereof. H. S. Van Buren, U. S. marshal.

79 *Subpœna.*

Criminal action.

In the United States Consular Court for the Port of Kanagawa, Japan.

THE PEOPLE OF THE UNITED STATES OF AMERICA
against
JOHN MARTIN ROSS.

The People of the United States of America to E. H. R. Manley:

You are commanded to appear before the U. S. consular court for the port of Kanawaga, Japan, at the court-room of said court, in the U. S. consulate building, on the 18th day of May, A. D. 1880, at 10 o'clock a. m., as associate in a criminal action prosecuted by the people of the United States of America against John Martin Ross on behalf of the people of the U. S.

Given under my hand and the seal of this court this the 17th day of May, A. D. 1880.

(Signed) THOS. B. VAN BUREN,
[SEAL.] *Consul General.*

80 (Indorsed:) No. 112. U. S. consular court, Kanagawa, Japan. People of the United States against John Martin Ross, defendant. Subpœna. Filed. (Signed) Geo. E. Rice, consular court clerk. Office of U. S. marshal, Kanagawa, Japan. I hereby certify that I served the within subpœna on the 17th day of May, 1880, on E. H. R. Manley, associate named in said subpœna, at Kanagawa, Japan, by showing original to him personally — informing him of the contents thereof. H. S. Van Buren, U. S. marshal.

81 *Subpœna.*

Criminal action.

In the United States Consular Court for the Port of Kanagawa, Japan.

THE PEOPLE OF THE UNITED STATES OF AMERICA
against
JOHN MARTIN ROSS.

The People of the United States of America to F. H. Olmstead:

You are commanded to appear before the U. S. consular court for the port of Kanagawa, Japan, at the court-room of said court, in the U. S. consulate building, on the 18th day of May, A. D. 1880, at 10 o'clock a. m., as associate in a criminal action prosecuted by the people of the United States of America against John Martin Ross on behalf of the people of the U. S.

Given under my hand and the seal of this court this the 17th day of May, A. D. 1880.

(Signed) THOS. B. VAN BUREN,
[SEAL.] *Consul General.*

(Indorsed:) No. 112. U. S. consular court, Kanagawa,
82 Japan. People of the United States against John Martin Ross, defendant. Subpœna. Filed. (Signed) Geo. E. Rice, consular court clerk. Office of U. S. marshal, Kanagawa, Japan. I hereby certify that I served the within subpœna on this 17th day of May, A. D. 1880, on F. H. Olmstead, associate named in said subpœna, at Kanagawa, Japan, by showing the original to him personally and informing him of the contents thereof. H. S. Van Buren, U. S. marshal.

83 *Subpœna.*

Criminal action.

In the United States Consular Court for the Port of Kanagawa, Japan.

THE PEOPLE OF THE UNITED STATES OF AMERICA
against
JOHN MARTIN ROSS.

The People of the United States of America to O. Keil:

You are commanded to appear before the U. S. consular court for the port of Kanagawa, Japan, at the court-room of said court, in the U. S. consulate building, on the 18th day of May, A. D. 1880, at 10 o'clock a. m., as associate in a criminal action prosecuted by the people of the United States of America against John Martin Ross on behalf of the people of the U. S.

Given under my hand and the seal of this court this the 17th day of May, A. D. 1880.

(Signed) THOS. B. VAN BUREN,
[SEAL.] *Consul General.*

(Indorsed:) No. 112. U. S. consular court, Kanagawa,
84 Japan. People of the United States against John Martin Ross, defendant. Subpœna. Filed. (Signed) Geo. E. Rice, consular court clerk. Office of U. S. marshal, Kanagawa, Japan. I hereby certify that I served the within subpœna on this 17th day of May, A. D. 1880, on O. Keil, associate named in said subpœna, at Kanagawa, Japan, by showing the original to him personally and informing him of the contents thereof. H. S. Van Buren, U. S. marshal.

85 In the United States Consular-General Court for Kanagawa, Japan.

THE UNITED STATES
vs.
JOHN MARTIN ROSS. } *Ex Rel.* JOHN P. REED.

Now comes the accused, John Martin Ross, by his counsel, G. W. Hill, and moves the court and prays that a jury be summoned according to law to hear and try the crime charged against the accused.

(Signed) G. W. HILL,
Counsel for Accused.

May 18th, 1880.

Constitution of the U. S., art. III, sect. II, par. 3.
" " " " amendment, art. VI.

In the United States Consular-General Court for Kanagawa, Japan.

THE UNITED STATES
vs.
JOHN MARTIN ROSS. } *Ex Rel.* JOHN P. REED.

And now comes John Martin Ross, the accused above-named, by G. W. Hill, his counsel, and demurs to the proceedings herein, and moves the court and prays to be discharged for the reason following:

86 That the said accused, John Martin Ross, is entitled in law and has a right to a public trial by an impartial jury of the district wherein the alleged crime has been committed.

(Signed) G. W. HILL,
Counsel for Accused.

May 18th, 1880.

Constitution of the U. S., art. III, sec. II, par. 3.
" " " " amend't, art. VI.
Kent Con., sect. XXIV, marg. p. 13.
Att'y Gen'l Op., V, IX, p. 200, per Jon. Black.
18 Howard U. S. Rep., p. 272.
4 Wallace, p-. 119–139, *Ex parte* Milligan.

In the U. S. Consular-General Court, Kanagawa, Japan.

THE PEOPLE OF THE UNITED STATES
against
JOHN MARTIN ROSS.

MAY 18, 1880.

To G. W. Hill, Esq., counsel for prisoner:

The following are the names of witnesses for the prosecution in the above cause: Sam'l Scott, Wm. Thomas, Chas. Brown, James Bennett, John Collins, Wm. Quinlan, John Coyle, Dr. T. H.
87 Tripler, John P. Reed, Constable Hazell.

(Signed) THO. B. VAN BUREN,
Consul General.

Copy served on counsel for prisoner 18th May, 1880.

88 *Subpœna.*

Criminal action.

In the United States Consular Court for the Port of Kanagawa, Japan.

THE PEOPLE OF THE UNITED STATES OF AMERICA
against
JOHN MARTIN ROSS.

The People of the United States of America to Dr. T. H. Tripler:

You are commanded to appear before the U. S. consulare court for the port of Kanagawa, Japan, at the court-room of said court, in the U. S. consulate building, on the 19th day of May, A. D. 1880, at 10 o'clock a. m., as a witness in a criminal action prosecuted by the people of the United States of America against John Martin Ross on behalf of the prosecution.

Given under my hand and the seal of this court this the 18th day of May, 1880.

(Signed) THOS. B. VAN BUREN,
[SEAL.] *Consul General.*

(Indorsed:) No. 112. U. S. consular court, Kanagawa, Japan. The People of the United States against John Martin Ross,
89 defendant. Subpœna. Filed. (Signed) Geo. E. Rice, consular court clerk. Office of U. S. marshal, Kanagawa, Japan. I hereby certify that I served the within subpœna on this 18th day of May, 1880, on Dr. T. H. Tripler, witnesses named in said subpœna, at Kanagawa, Japan, by showing the original to him personally and informing him of the contents thereof. H. S. Van Buren, U. S. marshal.

90 In the United States Consular-General Court for Kanagawa, Japan.

THE UNITED STATES
vs.
JOHN MARTIN ROSS. } *Ex Rel.* John P. Reed.

Now comes the accused above named, by his counsel, G. W. Hill, and moves the court and prays that the trial of this cause be postponed for a period of one month on the ground and for the reason that an impartial trial of the charge herein cannot be had at this place and at this time.

(Signed) G. W. HILL,
Counsel for the Accused.

May 19th, 1880.

In the United States Consular-General Court for Kanagawa, Japan.

THE UNITED STATES
vs.
JOHN MARTIN ROSS. } *Ex Rel.* John P. Reed.

John Martin Ross, the person named in the above-entitled charge, says that the charge herein is of a crime alleged to have been committed by the accused in the port of Yokohama on the 9th day of May instant and only ten days since; that, as he is informed and verily believes, there has been since the said 9th May and
91 still is in and among the community of foreigners residing here, and especially among those who are citizens of the United States, a feeling of great excitement on account of the said alleged crime and an intense and bitter feeling against the accused; that such a feeling pervades the community here to an extent that an impartial trial of the accused cannot be had at this time, and that the accused cannot safely proceed to trial at this time and at this place.

(Signed) JOHN M. ROSS.

Subscribed and sworn to before me at Kanagawa this 19th day of May, 1880.

(Signed) THOS. B. VAN BUREN,
Consul General.

In the U. S. Consular-General Court, Kanagawa, Japan.

THE UNITED STATES OF AMERICA
against
JOHN MARTIN ROSS. }

I hereby certify that the foregoing is a full, true, and correct copy of the record and evidence and of all and every part thereof in above-entitled cause on file in this court.

Yokohama, May 21, 1880.

THOS. B. VAN BUREN, [SEAL.]
Consul General.

92 UNITED STATES LEGATION,
TOKEI, JAPAN, *May* 22, 1880.

The foregoing record and the several matters therein contained having been read and examined, and it appearing therein that John Martin Ross was, on the 20th day of May, 1880, duly convicted of the crime of murder in manner and form as charged against him, and that Thomas B. Van Buren, Esq., the consul general, and the four several associates therein named, being citizens of the United States, did all concur in such conviction, the said conviction is hereby approved by me.

[SEAL.] JOHN A. BINGHAM,
Envoy Extraordinary and Minister Plenipotentiary of the United States of America to Japan.

[Endorsed:] U. S. circuit court, N. D. of N. Y. Filed Dec. 1, 1890. W. S. Doolittle, clerk.

93 *Opinion.*

United States Circuit Court, Northern District of New York.

In Re JOHN M. ROSS upon *Habeas Corpus.*

WALLACE, *J.:*

It appears by the petition and return in this case that the petitioner is now confined in the Albany penitentiary under a sentence of imprisonment for life, he having been originally sentenced to death by hanging and that sentence having been commuted by the President of the United States to imprisonment for life. It further appears that the sentence was imposed by the consul general of the United States at Kanagava, Japan, and approved by the United States minister resident in Japan, upon the conviction of the petitioner, after a trial before the consul general, of the crime of murder, committed in the harbor of Yokohama, Japan, on board an American vessel, of which the petitioner was at the time a member of the crew.

By the laws of the United States the ministers and consuls of the United States appointed to reside in China, Japan, Siam,
94 Egypt, or Madagascar are invested with judicial authority to arraign, try, and sentence all citizens of the United States charged with offences against laws committed in their respective countries, and also with all the judicial authority in regard to civil rights, whether of property or person, necessary to execute the provisions of treaties between the United States and the countries to which they are respectively accredited. Their jurisdiction embraces "all controversies between citizens of the United States or others provided for by such treaties." U. S. Revised Statutes, secs. 4083, 4084, 4085. Section 4086 of the Revised Statutes provides that such jurisdiction in both criminal and civil matters shall in all cases be exercised and enforced in conformity to the laws of the United States, which are, so far as is necessary to execute such treaties and so far as they are suitable to carry the same into effect, extended

over all citizens of the United States in those countries and over all others to the extent that the terms of the treaties justify or require. It further provides that "if neither the common law nor the law of equity or admiralty nor the statutes of the United States furnish appropriate and sufficient remedy the ministers in those countries respectively shall, by decrees and regulations which shall have the force of law, supply such defects and insufficiency." By secs. 4117 and 4119 the ministers are directed to prescribe and promul-
95 gate the forms of process, the mode of executing the same, and the manner in which trials shall be conducted, and they are directed to transmit their regulations, orders, and decrees to the Secretary of State to be laid before Congress for revision. Jurisdiction to try the petitioner was assumed by the consul general under the provisions of the treaty between the United States and Japan concluded June 15th, 1857, and proclaimed June 30th, 1858, which, among other things, contains the following stipulation: "Americans committing offences in Japan shall be tried by the American consul general or consul and shall be punished according to American laws. Japanese committing offences against Americans shall be tried by the Japanese authorities and punished according to Japanese law."

It is insisted for the petitioner that the sentence imposed upon him is void because the consul general did not have jurisdiction to try a person not a citizen of the United States; that if he had jurisdiction in the case the petitioner was entitled to be placed on trial only upon the presentment or indictment of a grand jury, and to be tried by a common-law jury, and that if the statutes which confer judicial powers and criminal jurisdiction upon ministers and consuls do not preserve to the accused the right to be tried only after presentment or indictment of the grand jury and then by jury these statutes are unconstitutional.

96 The questions which are thus presented are of great interest and importance. They have never been considered by any of the circuit or district courts or by the Supreme Court of the United States in any adjudications which have been brought to the attention of this court; yet, during the thirty years since the statutes conferring the judicial powers on ministers and consuls, which have been referred to, were enacted, that jurisdiction has been freely exercised. Citizens of the United States have been tried for serious offences before these officers, without preliminary indictment or a common-law jury, and convicted and punished. These trials have been authorized by the regulations, orders, and decrees of ministers, and it must be presumed that the regulations, orders, and decrees of ministers prescribing the mode of trial have been transmitted to the Secretary of State and by him been laid before Congress for revision, as required by law. Unless the petitioner was not properly subject to this jurisdiction because he was not a citizen of the United States his trial and sentence were in all respects model as well as substantial, regular, and valid under the laws of Congress according to the construction placed upon these statutes by the acquiescence of the executive, administrative, and legislative departments of the Gov-

ernment for this long period of time. It was the view of the
97 consul general, inasmuch as the petitioner was a seaman upon an American vessel, his status as a citizen of the United States, or at any rate as an American within the meaning of the treaty with Japan, could not be questioned while he was under the protection of the flag; and this view was approved by action of the minister to Japan, the State Department, and the President. Under these circumstances this court ought not to judge that the sentence imposed upon the petitioner and modified by the President was utterly unwarranted and void when the case is one in which his rights can be adequately protected by the Supreme Court, and when a decision by this court setting the petitioner at liberty, although it might be reversed, would be practically irrevocable.

(Indorsed:) Crim. 365. United States circuit court, northern district of New York. *In re* John M. Ross upon *habeas corpus*. Opinion, Wallace, J. Filed Dec. 1, 1890. W. S. Doolittle, clerk.

98 *Appeal.*

Circuit Court of the United States for the Northern District of New York.

In the Matter of the Petition of JOHN M. ROSS for a Writ of *Habeas Corpus.*

The above-named petitioner, John M. Ross, conceiving himself aggrieved by the order entered on January 21st, 1891, in the above-entitled proceeding, doth hereby appeal from said order to the Supreme Court of the United States; and he prays that this his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

GEORGE W. KIRCHWEY,
Attorney for Petitioner & Appellant, John M. Ross,
40 *Tweddle Building, Albany, N. Y.*

Albany, N. Y., March 10th, 1891.

And now, to wit, on March 11th, 1891, it is ordered that the appeal be allowed as prayed for.

WM. J. WALLACE.

(Indorsed:) In the matter of John M. Ross. Appeal. Filed March 19th, 1891. W. S. Doolittle, clerk.

99 *Citation.*

Circuit Court of the United States for the Northern District of New York.

In the Matter of the Petition of JOHN M. Ross for a Writ of *Habeas Corpus.*

UNITED STATES OF AMERICA, *ss:*

To D. S. Alexander, Esq., United States attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the fifth Monday of March, eighteen hundred and ninety-one, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein John M. Ross is appellant and The United States is respondent, to show cause, if any there be, why the judgment in the said notice of appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 11th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

WM. J. WALLACE.

Due service of the above citation upon appeal is admitted this 20th day of March, 1891.

D. S. ALEXANDER,
United States Attorney.

[Endorsed:] U. S. circuit court, N. D. of N. Y. Filed Mar. 23, 1891. W. S. Doolittle, clerk.

100 UNITED STATES OF AMERICA, *Northern District of New York,* } *ss:*

I, William S. Doolittle, clerk of the circuit court of the United States of America for the northern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 99, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the matter of John M. Ross upon *habeas corpus* as the same remain of record and on file in said office.

Seal of the U. S. Circuit Court, Northern District N. Y.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Utica, in the northern district of New York, in the second circuit, this twenty-sixth day of March, in the year of our Lord one thousand eight hundred and ninety-one and of our Independence the one hundred and fifteenth.

W. S. DOOLITTLE, *Clerk.*

Endorsed on cover: N. New York C. C. U. S. No. 1683. John M. Ross, appellant, *vs.* James McIntyre, superintendent of the penitentiary of the State of New York, at Albany. Filed March 30, 1891.

99 *Citation.*

Circuit Court of the United States for the Northern District of New York.

In the Matter of the Petition of JOHN M. ROSS for a Writ of *Habeas Corpus.*

UNITED STATES OF AMERICA, *ss:*

To D. S. Alexander, Esq., United States attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the fifth Monday of March, eighteen hundred and ninety-one, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein John M. Ross is appellant and The United States is respondent, to show cause, if any there be, why the judgment in the said notice of appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 11th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

WM. J. WALLACE.

Due service of the above citation upon appeal is admitted this 20th day of March, 1891.

D. S. ALEXANDER,
United States Attorney.

[Endorsed:] U. S. circuit court, N. D. of N. Y. Filed Mar. 23, 1891. W. S. Doolittle, clerk.

100 UNITED STATES OF AMERICA, } *ss:*
Northern District of New York, }

I, William S. Doolittle, clerk of the circuit court of the United States of America for the northern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 99, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the matter of John M. Ross upon *habeas corpus* as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Utica, in the northern district of New York, in the second circuit, this twenty-sixth day of March, in the year of our Lord one thousand eight hundred and ninety-one and of our Independence the one hundred and fifteenth.

Seal of the U. S. Circuit Court, Northern District N. Y.

W. S. DOOLITTLE, *Clerk.*

Endorsed on cover: N. New York C. C. U. S. No. 1683. John M. Ross, appellant, *vs.* James McIntyre, superintendent of the penitentiary of the State of New York, at Albany. Filed March 30, 1891.

Office Supreme Court U. S.
FILED,
APR 27 1891
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

JOHN M. ROSS, Appellant,
vs.
JAMES McINTYRE, Superintendent of the penitentiary of the State of New York, at Albany. } No. 1683.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

JOHN M. ROSS, Appellant,
vs.
JAMES MCINTYRE, Superintendent of the penitentiary of the State of New York, at Albany. } No. 1683.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from an order of the Circuit Court of the United States for the Northern District of New York, denying appellant's motion for his discharge from the custody of the respondent and dismissing the writ of *habeas corpus* issued upon the petition of the appellant out of the said court, on the 19th day of March, 1890. (Record, pp. 9 and 10.)

The facts of the case are as follows:

On the ninth day of May, 1880, John M. Ross, the appellant, a seaman on the American merchant vessel, the "Bullion," while the ship was lying at anchor in the harbor of Kanagawa, Japan, fatally assaulted Robert Kelly, the mate of the vessel. The assault was committed and the mate died on the deck of the ship. Ross was at once seized, put in irons and, on the same day, taken ashore and confined in the jail at Kanagawa. A sworn complaint,

charging him with murder, was, on the following day, filed by the master of the ship in the United States Consular General Court at that place.

Upon this complaint, without presentment or indictment by a grand jury, the prisoner was on the 18th day of May tried upon said charge in said Consular General Court before Thomas B. Van Buren, the United States Consul General, and four associates. (Record, 13–41.) The prisoner demanded but was refused a trial by jury. (Record, 15, 38.) He was convicted of the crime charged and sentenced to death, and this sentence was duly approved by the United States Minister to Japan. (Record, 29, 41.)

It nowhere appears on the record that, at the time of the killing and trial, Ross was an American citizen; he claimed to be and offered to prove that he was a British subject, but was not allowed to do so. (Record, 14, 15, 31, 33.)

On the 6th day of August, 1880, upon the application of the United States Minister to Japan, the President granted the prisoner a conditional pardon, and commuted his sentence to imprisonment for life in the Albany Penitentiary, where, and under which commutation of sentence, he is now confined. (Record, 2, 3, 6.)

On the 19th of March, 1890, the appellant filed his petition for a writ of *habeas corpus* in the Circuit Court of the United States for the Northern District of New York, wherein he alleged that he was deprived of his liberty and unlawfully confined by James McIntyre, superintendent of the Albany Penitentiary, by authority of the United States, and under the warrant of conditional pardon and commutation aforesaid. The appellant denied that the court which tried and convicted him had jurisdiction either of his person or of the offense, and claimed that his said trial, conviction and imprisonment were and are wholly illegal and without warrant of law. (Record, 1.)

The writ was issued and served, and due return made, and the matter was brought to a hearing before Judge Wallace, November 26, 1890. On the 21st of January, 1891, an order was entered dismissing the writ and remanding the petitioner to the said penitentiary and to the custody of the said superintendent. (Record, 5, 8, 9.)

The opinion of Judge Wallace appears. (Record, 41.)

The appellant raises and presents for the consideration of the court the following questions:

First. Whether the Consular General Court at Kanagawa had jurisdiction of the offense charged, the same not having been committed within the territory of Japan, but upon an American ship and within the jurisdiction of the domestic tribunals of the United States.

Second. Whether said Consular General Court, under the treaties with Japan and the laws enacted in pursuance thereof, had jurisdiction to try and render judgment against the appellant, it not appearing that he was a citizen of the United States, or that the person against whom the offense was committed was a Japanese.

Third. Whether said Consular General Court ever acquired jurisdiction over the appellant, in presuming to try him without presentment or indictment by a grand jury, as required by the fifth amendment to the Constitution of the United States.

Fourth. Whether the trial of the appellant by said Consular General Court, not having been by jury, was not a violation of his constitutional rights under subdivision 3, of section 2, of the third article of the Constitution, and under the sixth amendment thereto, and, therefore, wholly void.

These questions will be discussed in the order in which they are here presented.

The appellant claims that the order of the Circuit Court of the United States for the Northern District of New York, filed on the 21st day of January, 1891, denying his motion for his discharge from imprisonment at the hands of the respondent and dismissing the said writ of habeas corpus, was wholly erroneous and contrary to law.

ARGUMENT.

I.

THE CRIME HAVING BEEN COMMITTED ON BOARD AN AMERICAN VESSEL, ALTHOUGH SUCH VESSEL WAS LYING IN THE HARBOR OF KANAGAWA, JAPAN, WAS NOT COMMITTED WITHIN THE TERRITORIAL JURISDICTION OF THE CONSULAR GENERAL COURT OF KANAGAWA BUT WITHIN THAT OF THE UNITED STATES. IT WAS COGNIZABLE ONLY BY THE DOMESTIC TRIBUNALS OF THE UNITED STATES.

First. The Consular General Court, being a court of special and limited jurisdiction, has no powers save such as are expressly conferred by the treaty and statutes to which it owes its origin. These expressly confine its jurisdiction to the territorial limits of Japan.

The special and limited character of the jurisdiction exercised by the exterritorial courts, maintained by Christian nations in certain Oriental states, is now generally conceded. The judicial functions exercised by the consuls of such nations in the Levant are no longer regarded as a survival of the ancient magisterial authority of consular representatives, but as a modern device for protecting Christian residents and travelers in Mahometan and other oriental countries from the strange and oppressive laws and barbarous procedure of those countries. Accordingly, it is only by treaty, and as a matter of special compact in each instance, that the municipal laws and institutions of occidental states are allowed to have this exterritorial operation.

Wheat. Int. Law (Boyd), §§ 110, 110a.
Whart. Dig. Int. Law, § 125.

This point has been conclusively established, as far as the American doctrine is concerned, by the decision of this court in *Dainese v. Hale*, 91 U. S. 13, in which Mr. Justice Bradley, writing the opinion of the court, uses this language:

> "It may now be considered as generally true, that, for any judicial powers which may be vested in the consuls accredited to any nation, we must look to the express provisions of the treaties entered into with that nation, and to the laws of the states which the consuls represent."

The assumed jurisdiction of the so-called Consular Courts of the United States, in Japan, is based entirely upon certain provisions of two treaties, concluded between the two nations in 1857 and 1858, respectively. The former of these, known as the treaty of Simoda, and which was proclaimed on the 30th of June, 1858, concedes the claim of the United States to jurisdiction over her own citizens, in these terms :

"ARTICLE IV.

"Americans committing offenses in Japan shall be tried by the American Consul General or Consul, and shall be punished according to American law. Japanese commiting offenses against Americans shall be tried by the Japanese authorities and punished according to Japanese laws."

The treaty of Yedo, concluded July 29, 1858, and proclaimed on the 23d of May, 1860, substitutes for this article, the following:

"ARTICLE VI.

"Americans committing offenses against Japanese shall be tried in American Consular Courts, and when guilty shall be punished according to American law. Japanese committing offenses against Americans shall be tried by the Japanese authorities and punished according to Japanese law. The Consular Courts shall be open to Japanese creditors to enable them to recover their just claims against American citizens, and the Japanese Courts shall in like manner be open to American citizens for the recovery of their just claims against Japanese."

These treaties contain other provisions, relative to a certain cooperation and comity of proceeding between the American and Japanese authorities, but no other grant or concession of jurisdiction.

In assumed pursuance of these treaties and in order to carry the above quoted provisions into effect, the Congress of the United States, in 1860, passed a law (U. S. Stat. at Large, 1860, chap. CLXXIX, June 22d) investing ministers and consuls of the United States in Japan with judicial authority, defining their

jurisdiction and prescribing rules by which they should be governed in the administration of justice. This law, as amended and now in force, together with acts supplemental thereto, is now contained in Title XLVII of the Revised Statutes of the United States.

The following sections of the Revised Statutes contain the more important provisions of this legislation of Congress:

> SEC. 4083. To carry into full effect the provisions of the treaties of the United States with China, Japan, Siam, Egypt and Madagascar, respectively, the minister and the consuls of the United States, duly appointed to reside in each of those countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority herein described, which shall appertain to the office of minister and consul, and be a part of the duties belonging thereto, wherein, and so far as, the same is allowed by treaty.
>
> SEC. 4084. The officers mentioned in the preceding section are fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offenses against law, committed in such countries, respectively, and to sentence such offenders in the manner herein authorized; and each of them is authorized to issue all such processes as are suitable and necessary to carry this authority into execution.
>
> SEC. 4086. Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law

of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.

SEC. 4087. Each of the consuls mentioned in section forty hundred and eighty-three, at the port for which he is appointed, is authorized upon facts within his own knowledge, or which he has good reason to believe true, or upon complaint made or information filed in writing and authenticated in such way as shall be prescribed by the minister, to issue his warrant for the arrest of any citizen of the United States charged with committing in the country an offense against law; and to arraign and try any such offender; and to sentence him to punishment in the manner herein prescribed.

SEC. 4102. Insurrection or rebellion against the government of either of those countries, with intent to subvert the same, and murder, shall be capital offenses, punishable with death; but no person shall be convicted of either of those crimes unless the consul and his associates in the trial all concur in opinion, and the minister also approves of the conviction. But it shall be lawful to convict one put upon trial for either of these crimes, of a less offense of a similar character, if the evidence justifies it, and to punish as for other offenses by fine or imprisonment, or both.

SEC. 4103. Whenever any person is convicted of either of the crimes punishable with death, in either of those countries, it shall be the duty of the minister to issue his warrant for the execution of the convict, appointing the time, place, and manner; but if the minister is satisfied that the ends of public justice demand it, he may from time to time postpone such execution; and if he finds mitigating circumstances which authorize it, he may submit the case to the President for pardon.

SEC. 4106. Whenever, in any case, the consul is of opinion that by reason of the legal questions which may arise therein, assistance will be useful to him, or whenever he is of opinion that severer punishments than those specified in the preceding sections will be required, he shall summon to sit with him on the trial one or more citizens of the United States, not exceeding four, and in capital cases not less than four, who shall be taken by lot from a list which had previously been submitted to and approved by the minister, and shall be persons of good repute and competent for the duty. Every such associate shall enter upon the record his judgment and opinion, and shall sign the same; but the consul shall give judgment in the case. If the consul and his associates concur in opinion, the decision shall, in all cases except of capital offenses and except as provided in the preceding section, be final. If any of the associates differ in opinion from the consul, the case, without further proceedings, together with the evidence and opinions, shall be referred to the minister for his adjudication, either by entering up judgment therein, or by remitting the same to the consul with instructions how to proceed therewith.

The Congress has, furthermore, under the authority of the 10th subdivision of section 8, of the 1st Article of the Constitution, authorizing that body "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations," enacted the following provisions (Rev. Stat.):

SEC. 5339. Every person who commits murder * * * upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State;

Third, or who upon such waters maliciously strikes, stabs, wounds, poisons or shoots at any other person, of which striking, stabbing, wounding, poisoning or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death.

Section 5372 of the same title reads:

> SEC. 5372. Every person who commits upon the high seas, or in any river, harbor, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offense which, if committed within the body of a county, would be punishable with death by the laws of the United States, is a pirate, and shall suffer death.

The Congress has also provided by statute for the place of trial of any of the above enumerated offenses. (Rev. Stat., § 730). The trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.

By virtue of the enactments first above quoted, consuls of the United States sit and exercise the civil and criminal jurisdiction described, at Kanagawa (Yokohama), Osaka, Hiogo and Nagasaki, in Japan, while the United States minister exercises his combined original and appellate jurisdiction over the whole empire.

An examination of the statutes assuming to confer this jurisdiction under the treaties, shows that the jurisdiction is, by the terms of the law strictly confined to the territorial limits of Japan. (§§ 4084, 4087.) The language employed seems to show that the statutes are intended to apply to citizens of the United States residing in the empire or actually being upon Japanese soil. Thus the reference (§ 4084) is to offenses committed "in such countries," and "in the country." (§ 4087.) There appears nowhere any intention to extend this jurisdiction to vessels upon the high seas, even within the territorial waters of Japan. A recent authority (Scidmore, U. S. Courts in Japan, 1887) declares that offenses committed on the high seas are excluded from the cognizance of the Consular Courts (p. 14).

A Circuit Court of the United States has come to a more definite and pertinent conclusion even than this; namely, that the consular jurisdiction does not extend to the decks of American ships.

In the matter of Joseph Stupp (11 Blatch. 124) Mr. Justice Blatchford, after an elaborate review of the treaty-making and

legislation of the United States, of the kind under consideration, sums up as follows (p. 149):

> "Such are the law and the facts in regard to these treaty provisions, the Acts of Congress thereon, and the practical execution of them, in respect to the jurisdiction specially conferred by treaty upon officers of the United States, in regard to crimes commited by citizens of the United States, wholly out of the physical territory of the United States, *and not on board of vessels of the United States.*"

The fact that Japan might, in the absence of treaty or otherwise, have exercised jurisdiction in this case, the crime having been committed in her territorial waters, carries with it no implication as to the extent of the consular jurisdiction. It nowhere appears that Japan has parted with the whole of her jurisdiction, and there exists no ground for assuming that the jurisdiction of the Consular Courts in the empire is geographically co-extensive with the local jurisdiction.

It is to be observed also that the jurisdiction which a State exercises over its territorial waters is an incident of its sovereignty, and is based on political considerations. These reasons for its exercise do not apply to the Consular Courts, and the possession of such jurisdiction must accordingly be denied them.

SECOND.—*The domestic jurisdiction of the modern state extends to crimes committed upon private as well as public vessels of the state upon the high seas.*

This principle of the extension of the territorial sovereignty of a State over all seas which are traversed by her ships, and over all persons upon those ships, wherever their allegiance may be due, is firmly established in the municipal law of England and the United States, as well as in international law.

1 Kent's Com. (12th ed.), 156, n.
Wheat. Int. L. (Dana), § 95, n. 58.
Whart. Cr. L., § 269.

This jurisdiction was asserted by Mr. Cass, Secretary of State, in his instructions to the American Minister at the Court of St. James, in 1859, in these words:

> "By the law of nations every independent State possesses the exclusive right of police over all persons within its jurisdiction, whether upon its soil or in its vessels upon the ocean."
>
> Whart. Dig. Int. L., § 15.

The Congress has distinctly and emphatically affirmed the possession and exercise of this jurisdiction by the United States, by a long series of enactments designed to make it effectual.

Rev. Stat., §§ 5339, 5346, 5348, *et seq.*

For the purposes of this jurisdiction, a foreign port is regarded as being within the high seas and the ship as a part of the territory of the state to which she belongs.

The term "high seas" has been defined to mean any waters on the sea-coast which are without the boundaries of low-water mark, although such waters may be in a roadstead or bay, within the jurisdictional limits of a foreign government.

Rev. Stat., Gould & T,'s notes, p. 1011.

It was so held and the jurisdiction of the United States asserted in a case where the ship on which the crime was committed, an American schooner, lay at anchor in an open roadstead near the island of St. Jago, half a mile from shore (U. S. v. Ross, 1 Gall. 624); in another, where the vessel lay in the harbor of Palermo, fastened to the shore by cables (U. S. v. Seagrist, 4 Blatch. 420); in both these cases, and in many others which have been decided by the courts (*vide, e. g.*, U. S. v. Pirates, 5 Wheat. 184; U. S. v. Gordon, 5 Blatch. 18), it was held that the offense was committed on the *high seas* and, therefore, within the maritime jurisdiction of the United States.

The same doctrine was established in England, in 1868, by a decision of the Court of Criminal Appeal, which asserted the jurisdiction of the ordinary English tribunals over an American citizen, for a crime committed on board a British vessel, while such

vessel was proceeding up the river Garonne, in France (Reg. v. Anderson, 11 Cox Cr. Cas. 198).

This doctrine, which is now generally acquiesced in, establishes the proposition that although the *Bullion* was at the time lying in the territorial waters of Japan, the offense for which the appellant was tried and convicted was, nevertheless, committed upon the high seas, and thus within the immediate jurisdiction of the domestic tribunals of the United States.

THIRD.— *The original and domestic jurisdiction of the Federal Courts being adequate to deal with cases of this kind, it will not be presumed that the Congress intended to set up a novel jurisdiction of limited and inferior character, to supersede or compete with the former.*

It is contended that, in cases where this domestic jurisdiction exists, it must be taken to be exclusive of the assumed local jurisdiction. In the absence of clear terms conferring a duplicate or concurrent jurisdiction upon the Consular Courts, they must be regarded as merely supplementary to the Federal Courts.

It is evident that the reason for instituting exterritorial courts of this character fails, whenever they claim a jurisdiction already exercised by the territorial courts of the State. Clearly they are instituted to exclude a foreign and barbarous jurisdiction, not an existing domestic, civilized jurisdiction. Being established, as they avowedly are, for the better protection of the property and persons of our citizens, it would be a strange perversion of their purpose to subject to their crude and unconstitutional procedure, persons who are already entitled to trial, by due process of law, in the highly-organized constitutional courts of the United States.

FOURTH. — *The mode in which the jurisdiction of the United States in such cases must be exercised is prescribed by statute. It is expressly provided that all crimes committed on American vessels on the high seas shall be tried within the United States.*

U. S. Rev. Stat., § 730, *supra*.

The language of the statute is clear and comprehensive: "The trial of *all offenses committed upon the high seas*," etc.

The appellant should, therefore, have been brought back to the United States, where he would have been triable in the judicial district into which he should first be brought. (§ 730.)

II.

IF IT BE CLAIMED THAT THE OFFENSE IN QUESTION WAS COMMITTED IN JAPAN, AND NOT UPON THE HIGH SEAS, THE CONSULAR JURISDICTION OF THE UNITED STATES IS WHOLLY EXCLUDED BY THE FACT THAT THE RECORD DOES NOT DISCLOSE FACTS CONFERRING JURISDICTION UNDER THE TREATIES AND LAWS.

Inasmuch as the Consular General Court is a special tribunal having limited jurisdiction (7 Op. Attys.-Gen. 495, 500, Cushing), no presumption exists in its favor. It is bound to show its jurisdiction affirmatively.

Cooley, Const. Lim. (6th ed.) 500.
Hurd, Hab. Corp., §§ 370, 393, 394.
Galpin v. Page, 18 Wall. 366.

If the facts conferring jurisdiction do not affirmatively appear on the record and are not otherwise proved, the conviction is a nullity and may be set aside in a collateral proceeding.

People, ex rel. Frey, v. Warden, 100 N. Y. 20.
Church, Hab. Corp., § 368.

It has already been observed in the course of this argument that the extra-territorial jurisdiction, which certain European nations and the United States exercise in Japan and other oriental states, is purely statutory, and is based wholly upon treaties with those states. The United States can exercise no jurisdiction in Japan except such as is expressly conferred by the treaties with Japan, and authorized by the statutes passed in pursuance of such treaties.

FIRST.—*The treaties of the United States with Japan, and the laws passed by Congress in pursuance thereof, expressly restrict the jurisdiction of the Consular Courts to citizens of the United*

States. It does not appear that Ross was a citizen of the United States.

It is true that both the treaties use the term "Americans," but the word is not open to misconstruction. It must be taken to mean citizens of the American commonwealthwhich negotiated the treaty.

Whatever difference of opinion there might be upon this point, however, the term is limited and authoritatively defined by the acts of Congress passed to give the treaties effect. These acts invariably employ the phrase "citizens of the United States" (Rev. Stat., §§ 4083, 4084, 4087). Accordingly, it is only persons who are citizens of the United States who are amenable to this jurisdiction.

This question was raised in 1866, and conclusively determined by the Attorney-General (Speed), in an opinion addressed to Mr. Seward, the Secretary of State (11 Op. Attys.-Gen., 474). Construing the 6th article of the treaty of Yedo (1858), the Attorney-General said:

> "I do not think, however, it can be fairly inferred from this article of the treaty, that it was within the contemplation of the parties that the government of the United States should confer upon American Consular Courts in Japan, jurisdiction over the subjects or citizens of either countries resident in Japan" (p. 475).

After consideration of the statutes, he says further:

> "I do not think that either the treaty or the statute confers express jurisdiction upon Consular Courts, either to exercise criminal or civil jurisdiction over persons in Japan who are not citizens of the United States or subjects of the Japanese Empire" (p. 476).

And, finally, he says, "I am of opinion, therefore, * * * that the Consular Court could not, under the treaty with Japan, and the statutes of the United States, render a judgment over against a person of foreign birth not a citizen of the United States in Japan."

Vide, 7 Op. Attys.-Gen., 495 (Cush.).
1 Whart. Dig. Int. L., 125 (p. 808).
2 Whart. Dig. Int. L., 253.
Dainese v. Hale, *supra*.

There is no authority for the jurisdiction claimed to exist in favor of these Consular Courts over foreigners serving on board American vessels. The term, "citizens of the United States," is plain and unambiguous and must be taken to have its ordinary and proper signification.

The familiar rule of interpretation, that a statute containing a grant of power will be strictly construed against the grantee of the power, would seem to exclude the extended signification which is sought to be given to the phrase. This rule applies with particular force to a court of special and limited powers such as the one under discussion.

Vattel, in discussing the interpretation of treaties, lays down the rule, that where the sufficient and only reason of a provision is undisputed and certain, such provision may be extended to cases to which the *same* reason applies, although the provision be not comprised within the signification of the terms employed.

Vattel, I, II, c. 17, s. 291–2.

But the reason of the provision conferring this judicial power upon American consuls in the Levant is fully satisfied by the less extensive interpretation contended for, and the same reason does not apply for its application to persons not actually citizens of the United States. The provisions under consideration do not indicate an attempt on the part of the United States to acquire jurisdiction over persons not already subject to their jurisdiction, but only to extend their jurisdiction over their own citizens into territorial limits from which it was excluded: and the whole object was to extend the protecting arm of American law over American citizens, in a territory where that law had no force and could not be invoked.

But the United States are under no duty of legal protection to citizens of other States. By shipping on an American vessel, these may have subjected themselves, temporarily, to the jurisdiction of American courts, but they have not thereby acquired American citizenship nor become entitled to the peculiar and distinguishing privileges of American citizens.

It is respectfully submitted that the construction of the phrase, "citizens of the United States," which has apparently been adop-

ted by the department of State (Circular of June 1, 1881; Report of Mr. Blaine, Sec. of State, to President, December 19, 1881; 1 Whart. Dig. Int. Law, 125), and by the Consular General Court at Kanagawa (*U. S.* v. *Fullert*, May 18, 1886) is improper and should not receive the sanction of high judicial approval.

SECOND. — *The treaty now in force with Japan expressly restricts the jurisdiction of the Consular Courts to Americans committing offenses against Japanese. It does not appear that the person for whose death the appellant was tried was a Japanese.*

It appears to have escaped the notice of Congress and the courts, as well as of the distinguished men who have for thirty years, presided over the State department, that the sixth article of the treaty of Yedo (being the treaty of 1858) is even more restricted in its scope than the fourth article of the treaty of Simoda (1857), which first recognized this consular jurisdiction. For, whereas, the former treaty conferred upon the consuls jurisdiction as to all offenses committed by Americans "in Japan," the latter restricts it to "Americans committing offenses against Japanese." As the treaty of Simoda was expressly revoked by the treaty of Yedo (art. XII), it becomes a serious question as to whether the legislation of Congress, giving the American consul jurisdiction over offenses committed by American citizens in Japan, irrespective of the nationality of the offended party, is not in excess of its powers under the treaty, and therefore null and void.

This clause of the treaty is an evident attempt on the part of the Japanese government to recover some portion of the previously granted exterritorial jurisdiction, by restricting the number of offenses to which that jurisdiction should apply. It assimilates the condition of American citizens to that of Japanese subjects under the treaty, and obviously excludes from the cognizance of the Consular Courts in the empire all offenses by Americans except those of which the Japanese are the victims.

III.

ASSUMING THAT ROSS HAD THE STATUS OF A CITIZEN OF THE UNITED STATES, AND WAS AMENABLE, UNDER THE TREATY AND

LAWS, TO THE JURISDICTION OF THE UNITED STATES CONSULAR COURT, THAT COURT NEVERTHELESS FAILED TO ACQUIRE JURISDICTION BY PRESUMING TO TRY HIM WITHOUT PRESENTMENT OR INDICTMENT BY A GRAND JURY.

FIRST.—*The case not having arisen in the land or naval forces or in the militia, and the offense charged being a capital crime, the accused was entitled under the Constitution, to presentment or indictment of a Grand Jury.*

Amendment to Const., Art. V.

This constitutional guarantee is not limited in its application to American citizens, nor to American soil, but extends to all persons within the jurisdiction of the courts and the law of the United States.

The language of the constitutional provision is as broad and general as it is possible to make it: "*No person shall be held to answer* for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." If this has any meaning it must intend that "no person shall be held" *by authority of the United States, or by any person acting under such authority.* There is nothing in the context, or in the position of the article in question, to indicate or suggest that it is intended to apply only to certain persons, or to certain courts, or to certain territory. It applies to *all persons*, wherever they may be, whoever may presume to hold them. It prohibits Congress from setting up a tribunal anywhere which shall be free from the obligation imposed by it, and it nullifies the acts of any person or court which presumes to ignore it. Wherever the judicial power of the United States extends, it is bound to enforce the provision and to annul all acts done in violation of it.

This view of the case was forcibly presented by Mr. Van Buren, the Consul General who presided at the trial of this cause, in his report thereof to Mr. Hay, the Assistant Secretary of State (Record, 10–12), in the following words:

> "As for myself, I confess that I cannot comprehend the ingenuity by which these far-reaching provisions of the

> Constitution (referring to the article under discussion and to the provisions relating to trial by jury) can be thus legally evaded."

The practical difficulties in the way of carrying this provision into effect in Oriental and other barbarous or semi-barbarous lands, is no justification for a deliberate violation of constitutional rights. Or, if indeed it be, as is claimed, a complete justification in the forum of practical affairs, it can surely give to the man who thus pleads its violation no standing before a constitutional tribunal.

Neither is there any ground for the claim that the Consular General Court exercises a deputed Japanese jurisdiction and that the accused is tried as a Japanese criminal. The native government has had no hand in setting up the tribunal. It formally abandons its own jurisdiction and turns over the criminal to the United States authorities to be tried by an American tribunal according to American law. (*Vide* Treaties, *supra.*)

The treaty is a cession of jurisdiction, and invites the United States government to set up its own machinery of justice, virtually conceding, for certain purposes, the establishment of an *imperium in imperio.* Mr. Cushing, when Attorney-General (1855), speaking of similar treaties to the one under consideration (7 Op. Attys.-Gen. 495), used these words:

> "In order to execute these treaties — to carry the laws of the United States into Turkey and China,— to have *our territorial jurisdiction* follow our people and our flag into those Empires," etc. (p. 502).
>
> Whart. Dig. Int. L., § 176.

But the facts of the case before the court effectually dispose of the claim that the Consular General Court of the United States at Kanagawa is a Japanese tribunal. The accused was arraigned and tried under the statute as an American citizen; he was charged with a criminal offense against the laws of the United States; the penalty provided by those laws was visited upon him; and it does not appear and is nowhere charged that he violated any law or custom of the Empire.

SECOND.—*The statutes creating the Consular Courts, as well as the treaties under which they are instituted, and from which they derive such authority and jurisdiction as they possess, expressly subject that jurisdiction to the laws of the United States.*

The only law under which the United States can exercise their exterritorial jurisdiction in Japan is "American law" (Treaties, *supra*).

The statute (§ 4086) is mandatory. It not only extends "the laws of the United States" "over all citizens of the United States in those countries," but it explicitly provides that "jurisdiction in both civil and criminal matters, *shall, in all cases, be exercised and enforced* in conformity with the laws of the United States."

This leaves nothing to be desired in the way of plainness or directness, and it is difficult to see how the violation of the constitutional requirement can be reconciled with its terms.

This statute is, in the main, a copy of the law passed in 1848, for carrying into effect certain provisions of the treaties, then lately entered into, by the United States with China and the Ottoman Empire, which law was elaborately discussed by Mr. Cushing, the Attorney-General, in an opinion which has been before referred to (7 Op. Attys.-Gens., 495). The part of the act relating to China, corresponding to the statute under consideration, is as follows:

> "Such jurisdiction, in criminal and civil matters, shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute said treaty, extended over all citizens of the United States in China (and over all others to the extent that the terms of the treaty justify or require), so far as such laws are suitable to carry said treaty into effect," etc., etc.

As will be seen, the language of this enactment is almost identical with that of the more recent act which has replaced it (Rev. Stat. *supra*), and is in all essential respects the same.

Mr. Cushing, in his authoritative interpretation of this law, said (p. 503): "The system of law is composed, therefore, of

"1. The laws of the United States, *comprehending the*

Constitution, treaties, acts of Congress, equity and admiralty law," etc., etc.

THIRD.—*The claim that the Constitution has no extraterritorial force is disproved by the existence and operation of the Consular Court itself.*

This court, in so far as it exercises any lawful power or jurisdiction, is itself the creature of the Constitution. It cannot deny the exterritorial force of that instrument without denying its own jurisdiction. The only alternative is to take refuge in the absurdity that the Constitution may operate indirectly by authorizing Congress to legislate exterritorially, but that it cannot operate directly upon the court which is set up by means of such legislation. Or will it be claimed that the fundamental law has just enough exterritorial force to create a new jurisdiction and set in motion a court to exercise that jurisdiction, but not enough to supervise and regulate its exercise? The mere statement of these propositions is their refutation.

The fact that the proceedings in this case were had wholly under authority of United States statute, and by the exercise of a jurisdiction set up and defined by acts of Congress, would seem to dispose of the claim that the Constitution has no application to the exterritorial jurisdiction therein exercised. The laws of Congress, "made in pursuance" of the Constitution, can have no wider extent than that instrument itself has, and cannot be applied to persons to whom the guarantees and prohibitions of the Constitution do not apply.

IV.

THE REFUSAL TO ALLOW THE ACCUSED A TRIAL BY JURY WAS A FATAL DEFECT IN THE JURISDICTION EXERCISED BY THE COURT AND RENDERS ITS JUDGMENT ABSOLUTELY VOID.

FIRST.—*The jury contemplated by the Constitution* (Art. III, § 2, subd. 3; amendments, art. VI), *and demanded by the appellant is a common law jury of twelve men.*

The presence of the four associates provided for by the statute, (§§ 4106, 4107), and performing a statutory function, does not exonerate the consul general from the obligation of providing a constitutional jury of twelve men for the trial of the accused. This obligation is absolute and imperative, and the statute authorizing the minister, by and with the advice of the consuls, to prescribe the manner in which trials shall be conducted (§ 4117), is not intended to authorize any form or manner of trial other than that required by the Constitution.

SECOND. — *There appears to be nothing in the legislation of Congress relating to the exercise of this consular jurisdiction to preclude compliance with the constitutional requirement.*

If it should be held, however, that the Congress, by the acts empowering the minister and consuls to make regulations, decrees and orders relative to the conduct of trials and the exercise of the consular jurisdiction (§§ 4086, 4117-4119), intended to authorize the institution of a novel procedure, without trial of the accused by jury, in cases where the Constitution would require a trial by jury in the domestic tribunals of the United States, such legislation is unconstitutional, null and void.

V.

THE ORDER OF THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, HERE APPEALED FROM, SHOULD BE REVERSED AND THE APPELLANT DISCHARGED FROM THE CUSTODY OF THE RESPONDENT.

GEORGE W. KIRCHWEY,
Counsel for Appellant.

Office Supreme Court U. S.
FILED,
APR 29 1891
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

JOHN M. ROSS
vs.
JAMES McINTYRE, SUPERINTENDENT of the penitentiary at Albany. } No. 1683.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

STATEMENT.

On Sunday, the 9th day of May, 1880, the appellant, John M. Ross, was one of the crew of the American merchant ship *Bullion*, which was then in Japanese waters and was lying in the harbor of Yokohama, Japan. On that day, on board of said ship, said Ross killed Robert Kelly, the second mate of the vessel.

The circumstances of the killing show it to have been murder. Ross was taken into custody upon the ship by

direction of its master, who filed a complaint charging him with the murder with the consul-general. Trial was had before the consul-general and four associates, as provided by statute, and the appellant was found guilty of the crime charged and was sentenced to suffer death.

The trial was concluded at Kanagawa, Japan, May 20, 1880.

Upon consideration the President, under date of August 6, 1880, offered a conditional pardon to said appellant, the material clause being as follows (Rec., p. 3):

> Now, therefore, be it known that I, Rutherford B. Hayes, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons also me thereunto moving, do hereby pardon the said John M. Ross on condition that the said John M. Ross be imprisoned at hard labor, for the term of his natural life, in the Albany penitentiary, in the State of New York.
>
> This order will be carried into effect under the direction of the Secretary of State.

And the said appellant duly accepted said pardon upon the condition on which it was offered, such acceptance being in the words and figures following (pp. 3, 4):

> I, John M. Ross, the person named in the warrant of conditional pardon granted to me by the President of the United States of America, dated 6th day of August, 1880, and of which the foregoing is a true and correct copy, do hereby acknowledge the delivery of said original warrant of conditional pardon to me, and do hereby voluntarily and without qualification accept such conditional pardon, with the condition thereof as therein stated, to wit, that "I, Rutherford

B. Hayes, President of the United States of America, etc., do hereby pardon the said John M. Ross on the condition that the said John M. Ross be imprisoned at hard labor, for the term of his natural life, in the Albany penitentiary, in the State of New York."

JOHN M. ROSS.

KANAGAWA, YOKOHAMA, JAPAN, *February* 28, 1881.

Witness:

THOS. B. VAN BUREN,
U. S. Consul-General.

Whereupon the appellant was imprisoned in the Albany penitentiary and there still continues in custody.

Upon the said trial the defendant, John M. Ross, objected to the jurisdiction of the court upon the ground that he was a British subject, and presented an affidavit verified by himself stating that he is a subject of Great Britain, that he is a native of Prince Edward's Island, a dependency of the British Empire, and that he retains his rights as a British subject (pp. 31, 33).

He also moved to dismiss the charge and complaint on the ground that he ought not to be held to answer for the crime except upon a presentment or indictment by a grand jury, which had not been done (pp. 15, 34).

He also demanded a trial by jury, which was refused and exception entered (p. 15).

March 19, 1890, the appellant filed his petition for a writ of habeas corpus in the circuit court of the United States for the northern district of New York, wherein he alleges that he is deprived of his liberty and unlawfully

confined by James McIntyre, superintendent of the Albany penitentiary, by authority of the United States, and under the warrant of pardon, commutation, and acceptance aforesaid.

The petitioner claims that the trial proceedings were null and void.

The writ was issued and served and due return was made by the superintendent of the penitentiary in accordance with the facts.

The hearing was had before the court (Wallace, J.) November 26, 1890, and January 21, 1891, an order was entered (p. 9) dismissing the writ and remanding the petitioner to the said penitentiary and to the custody of the said superintendent, where he now remains.

The opinion of Judge Wallace appears, Rec. pp. 41 to 43.

The petitioner appeals from said order to this court.

TREATY AND STATUTES.

By the treaty between the United States and Japan concluded June 17, 1857, and proclaimed June 30, 1858 (11 Stat., 723,) it is provided as follows:

> ARTICLE IV. Americans committing offenses in Japan shall be tried by the American consul-general or consul, and shall be punished according to American laws.
>
> Japanese committing offenses against Americans shall be tried by Japanese authorities, and punished according to Japanese laws.

Under the heading of crimes arising within the maritime and territorial jurisdiction of the United States (Rev. Stat.) it is enacted as follows:

> SEC. 5339. Every person who commits murder * * *
>
> Second, or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State.
>
> Third, or who upon such waters maliciously strikes, stabs, * * * any other person, of which striking, stabbing, * * * such other person dies, * * * shall suffer death.

Section 5372 of the same title reads:

> SEC. 5372. Every person who commits upon the high seas, or in any river, harbor, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offense which, if committed within the body of a county, would be punishable with death by the laws of the United States, is a pirate, and shall suffer death.

The following sections of the Revised Statutes present enactments deemed material in this case, viz:

> SEC. 4083. To carry into full effect the provisions of the treaties of the United States with China, Japan, Siam, Egypt, and Madagascar, respectively, the minister and the consuls of the United States, duly appointed to reside in each of those countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority herein described, which shall appertain to

the office of minister and consul, and be a part of the duties belonging thereto, wherein, and so far as, the same is allowed by treaty.

C. 194, S. L., v. 16, p. 183; 23 Mar., 1874, c. 62, v. 18, p. 23.

See President's Proclamation, No. 10, v. 18, p. 850.

SEC. 4084. The officers mentioned in the preceding section are fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offenses against law, committed in such countries, respectively, and to sentence such offenders in the manner herein authorized; and each of them is authorized to issue all such processes as are suitable and necessary to carry this authority into execution.

SEC. 4086. Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.

SEC. 4087. Each of the consuls mentioned in section forty hundred and eighty-three, at the port for which he is appointed, is authorized upon facts within his own knowledge, or which he has good reason to believe true, or upon complaint made or information filed in writing and authenticated in such way as shall be prescribed by the minister, to issue his warrant for the arrest of any citizen of the United States charged with committing in the country an offense against law; and to arraign and try any such offender; and to sentence him to punishment in the manner herein prescribed.

SEC. 4088. The consuls and commercial agents of the United States at islands or in countries not inhabited by any civilized people, or recognized by any treaty with the United States, are authorized to try, hear, and determine all cases in regard to civil rights, whether of person or property, where the real debt or damages do not exceed the sum of one thousand dollars, exclusive of costs, and upon full hearing of the allegations and evidence of both parties, to give judgment according to the laws of the United States and according to the equity and right of the matter, in the same manner as justices of the peace are now authorized and empowered where the United States have exclusive jurisdiction. They are also invested with the powers conferred by the provisions of sections forty hundred and eighty-six and forty hundred and eighty-seven for trial of offenses or misdemeanors.

SEC. 4102. Insurrection or rebellion against the government of either of those countries, with intent to subvert the same, and murder, shall be capital offenses, punishable with death; but no person shall be convicted of either of those crimes unless the consul and his associates in the trial all concur in opinion, and the minister also approves of the conviction.

But it shall be lawful to convict one put upon trial for either of these crimes, of a less offense of a similar character, if the evidence justifies it, and to punish as for other offenses by fine or imprisonment, or both.

Sec. 4103. Whenever any person is convicted of either of the crimes punishable with death, in either of those countries, it shall be the duty of the minister to issue his warrant for the execution of the convict, appointing the time, place, and manner; but if the minister is satisfied that the ends of public justice demand it, he may from time to time postpone such execution; and if he finds mitigating circumstances which authorize it, he may submit the case to the President for pardon.

Sec. 4106. Whenever, in any case, the consul is of opinion that, by reason of the legal questions which may arise therein, assistance will be useful to him, or whenever he is of opinion that severer punishments than those specified in the preceding sections will be required, he shall summon to sit with him on the trial one or more citizens of the United States, not exceeding four, and in capital cases not less than four, who shall be taken by lot from a list which had previously been submitted to and approved by the minister, and shall be persons of good repute and competent for the duty. Every such associate shall enter upon the record his judgment and opinion, and shall sign the same; but the consul shall give judgment in the case. If the consul and his associates concur in opinion, the decision shall, in all cases except of capital offenses and except as provided in the preceding section, be final. If any of the associates differ in opinion from the consul, the case, without further proceedings, together with the evidence and opinions, shall be referred to the minister for his adjudication,

either by entering up judgment therein, or by remitting the same to the consul with instructions how to proceed therewith.

ARGUMENT.

I.

PRELIMINARY OBJECTION TO THE SCOPE AND EXTENT OF APPELLANT'S CONTENTION.

As the record presents here all of the antecedent proceedings in the case, it is deemed proper to ask the attention of this court to a question which may naturally precede in consideration the questions raised by the learned counsel for the petitioner.

The killing for which the petitioner is now held is shown to have been a premeditated and brutal murder.

The ferocious stabbing of the ship's mate to his death and the gloating of the murderer over the body of the victim are proofs of a shocking and dangerous depravity.

The petitioner brings here evidence which shows him to be a dangerous criminal, and one whose restraint by physical force is required to protect the peace of society and the safety of individuals.

The power to grant reprieves and pardons is vested in the President by the Constitution. (Art. 2, sec. 2.)

The President may grant a pardon as well before trial or conviction as afterward. The grant may be conditional or absolute. Congress can neither limit the effect of a pardon nor exclude its full exercise. Congress can not authorize the courts to supervise it. Courts have no power to interfere with it.

The court below, upon ascertaining that the petitioner was held upon a warrant of conditional pardon, granted by the President and accepted by the petitioner, was without jurisdiction to go further than to remand the prisoner and dismiss the writ.

The prisoner is in custody by virtue of the prerogative of the President, which is not yet spent. What authority has the circuit court to supervise, or sit in judgment upon, or to interfere with this continuing consequence of the executive prerogative?

The killing is impossible of denial; it occurred upon an American documented ship (fol. 38), in foreign waters; the petitioner was in custody charged with the killing, and if there had been no trial whatever the granting of this pardon by the President, and its acceptance by the prisoner, and the entering upon the performance of the condition by him establishes the grant and its consequences.

Can it be claimed that the prisoner is now subject to indictment and trial for his crime, and that the grant of pardon is without power to protect him? Can he now repudiate it?

The President, exercising the power given him by the people through the Constitution, says:

> I * * * do hereby pardon the said John M. Ross on condition that the said John M. Ross be imprisoned at hard labor for the term of his natural life in the Albany penitentiary, in the State of New York.

The prisoner responds to the executive head of the nation:

> I, John M. Ross, * * * do hereby voluntarily and without qualification accept said conditional pardon with the condition thereof as therein stated.

May the circuit court go behind the warrant of pardon, reconsider the record which was considered by the President (fol. 14), and judge the grounds or purposes or wisdom of the President's action?

It is respectfully submitted that the case presented upon this appeal is not one properly calling for judicial investigation.

If the prisoner had not accepted this grant of pardon with its condition he would have been subject to execution for his crime. By accepting the grant and entering upon the performance of its condition he is precluded from now going back of the accepted grant to test the trial proceedings after this lapse of time, or to seek a new trial after the witnesses have disappeared.

In *Ex parte: Wells* (18 How., 307) the court say (p. 315) that "the power to offer a condition, without ability to enforce its acceptance when accepted by the convict, is the substitution, by himself, of a lesser punishment than the law has imposed upon him, and he can not complain if the law executes the choice he has made." The court there answers another objection by quoting: "And a man condemned to be hung can not be permitted to escape the punishment altogether by pleading that he had accepted his life *duress per minas*."

It is admitted that the court has jurisdiction to inquire as to legality of the detention of the prisoner, but it can not retry the case; it can only determine whether the prisoner is now properly held.

Mr. Justice McLean (p. 318) in his dissenting opinion in Wells's Case says:

> The culprit is detained in prison under this commutation of the President, which the circuit court held he had power to do, and remanded the prisoner on that ground. Whether this be legal is the inquiry of the habeas corpus. *It does not reach the original sentence of the court.* That sentence is considered only as the ground of the commutation; and if the President had no power to make it, the detention of Wells is illegal.

The principles involved are referred to: *Paschal's Constitution* (3d ed., pp. 172, 173); *United States* vs. *Wilson* (7 Pet., 150); *Ex parte: Wells* (18 How., 307).

It is respectfully submitted that when it appears that a prisoner is in custody serving out a sentence imposed by a grant of conditional pardon, which has been accepted and agreed to by the prisoner, the court may consider as to the fact of the grant of pardon and as to its acceptance, but will not go back of this transaction and pass upon the jurisdiction or review the trial proceedings of the consular court.

It is beyond question in the power of the President to pardon by a conditional grant previous to any conviction or trial.

In such a case, long after the acceptance, may the prisoner go back of the grant and its acceptance and try the

fact of his guilt, or may he try the competency or the jurisdiction of a court before which he had been brought previous to the pardon?

The law has not been so decided.

II.

THE ARGUMENT PRESENTED BY THE CASE AT BAR.

The executive acts of the United States Government in connection with the case at bar appear, 1 Wharton International Law, section 125, as follows:

> The position taken by the Government of the United States in this legislation, under the articles of the treaty, is that a foreign seaman duly enrolled on an American merchant vessel is subject to the laws and entitled to the protection of the United States to precisely the same extent that a native-born seaman would be during the period of his service; that although not an American citizen, he is unquestionably an American seaman. * * *
>
> When a foreigner enters the mercantile marine of any nation and becomes one of the crew of a vessel having undoubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and in return for the protection afforded him becomes subject to the laws by which that nation, in the exercise of an unquestioned authority, governs its vessels and seamen. If, therefore, the Government of the United States has, by treaty stipulations with Japan, acquired the privilege of administering its own laws upon its own vessels and in relation to its own seamen in Japanese territory, then every American vessel and every seaman of its crew are subject to the jurisdiction by which such treaty has been transferred to the Government of the United States.

Mr. Blaine, Secretary of State, to Sir E. Thornton, June 3, 1881. MSS. Notes, Great Britain.

The intimacy between our own country and Japan, the most advanced of the Eastern nations, continues to be cordial. I am advised that the Emperor contemplates the establishment of full constitutional government, and that he has already summoned a parliamentary congress for the purpose of effecting the change. Such a remarkable step toward complete assimilation with the Western system can not fail to bring Japan into closer and more beneficial relationship with ourselves as the chief Pacific power.

A question has arisen in relation to the exercise in that country of the judicial functions conferred upon our ministers and consuls. The indictment, trial, and conviction in the consular court at Yokohama of John Ross, a merchant seaman on board an American vessel, have made it necessary for the Government to institute a careful examination into the nature and methods of this jurisdiction.

It appeared that Ross was regularly shipped under the flag of the United States, but was by birth a British subject. My predecessor felt it his duty to maintain the position that, during his service as a regularly shipped seaman on board an American merchant vessel, Ross was subject to the laws of that service and to the jurisdiction of the United States consular authorities.

President Arthur, first annual message, 1881.

A seaman duly enrolled in a merchant vessel of the United States, lying in the port of Yokohama, and who there was guilty of murder, is within the jurisdiction of the United States consul at that port and may be convicted of such crime, although he was at the time a British subject.

Mr. Blaine, Secretary of State, report to President, December 19, 1881. MSS. report book.

* * * * *

Your letter of the 21st instant has been received. It relates to the case of J. M. Ross, alleged to be a British subject, who, having in 1880 killed a fellow-seaman named Robert Kelly, on the American ship *Bullion*, in the harbor of Yokohama, was tried by the United States consular court there, convicted, and sentenced to death, which penalty was later commuted by the President to imprisonment for life in the Albany penitentiary, where Ross is now confined.

You state that Ross "wishes to have his case reviewed on the ground that the court had not jurisdiction of his person, he being then and now a British subject."

The question of jurisdiction in Ross's case has already had full consideration on two pleas—want of jurisdiction of his person and unconstitutionality of the form and manner of trial. The latter plea, being of municipal competence, was before the circuit court of San Francisco on a writ of habeas corpus, sued out by Ross on reaching that port on his way from Yokohama to Albany, April 4, 1881, and the court dismissed the writ. The constitutionality of the judicial extraterritorial procedure prescribed by statute under the authority of the treaty is established. This branch of the question can be municipally tested by being brought before the United States courts by habeas corpus.

The plea that Ross, being an alien, was beyond the jurisdiction of the consular court, was raised by the British Government. * * *

This Government denied the plea on the admitted doctrine that the sovereign of the flag of a ship has

> jurisdiction of crimes committed by foreigners on such ship on the high seas or in ports where the courts of the United States have jurisdiction, and that Ross, being a duly articled seaman on an American ship, was within the statutory and treaty jurisdiction of the United States court at Yokohama. If this phase of the question is to be revived, it can only be presented by the British Government through the diplomatic channel.
>
> Mr. Porter, Asst. Sec. of State, to Mr. Stimson, June 28, 1886. MSS. Dom. Let.

The opinions given below in this case are somewhat shaken by the fact that those who rendered them express a doubt as to their correctness.

Consul-General Van Buren in his report (pp. 11, 12) says:

> I desire to say, also, that previous to proceeding to try the case in question, I consulted the United States minister, and his opinion expressed to me was that the mode prescribed by the statute for such trials was not in conflict with the Constitution, and he has also written me that the trial of the prisoner in this case, before myself and four associates, would, in his opinion, be regular and his conviction and sentence legal.
>
> As for myself, I confess that I can not comprehend the ingenuity by which these far-reaching provisions of the Constitution can be thus legally evaded. The counsel for the prisoner contended, not that the statute was in violation of the Constitution, but that the practice was in violation of the statute. He insisted that the framers of the law never contemplated an abandonment of jury trials, and that the associates provided by the statute were only intended to act as associate judges and not in any respect as jurors.

> Surely these questions are too serious and important longer to remain unsettled, and I earnestly urge upon the Department the necessity of having them passed upon by competent authority, so that our consular courts in Japan may be properly advised.

Judge Wallace says (p. 42):

> The questions which are thus presented are of great interest and importance. They have never been considered in any of the circuit or district courts or by the Supreme Court of the United States in any adjudications which have been brought to the attention of this court; yet, during the 30 years since the statutes conferring the judicial powers on ministers and consuls, which have been referred to, were enacted, that jurisdiction has been freely exercised. Citizens of the United States have been tried for serious offenses before these officers, without preliminary indictment or a common-law jury, and convicted and punished. These trials have been authorized by the regulations, orders, and decrees of ministers, and it must be presumed that the regulations, orders, and decreees of ministers prescribing the mode of trial have been transmitted to the Secretary of State and by him been laid before Congress for revision, as required by law.

If the state of the law justifies the expression of these doubts, a case seems to have arisen which challenges a rule akin to that cited in Campbell's Compendium of Roman Law (p. 161), which states that—

> When the Empire of the West perished in A. D. 476, there existed four practical sources of law:
>
> I. The works of the jurists, subject to the rule laid down in the Constitution of Valentinian III. (By this rule the works of Papinian, Paul, Gaius, Ulpian,

> and Modestinus received legal authority; when these jurists were not unanimous, the opinion of the majority was to obtain; if there was an equality of opinions, that of Papinian was decisive; if Papinian was silent the question was left to the judge.)

It does not appear, however, that there is any good reason to question the legality of the trial and punishment of the appellant. The case of Ross was made the subject of diplomatic consideration between the representatives of the Governments of the United States and Great Britain in 1881, and the right to try and punish him as he was tried and was being punished, was presented on the part of the United States in an elaborate argument, and thereupon the matter was allowed to rest.

In the case of the appellant, Ross, the British Government objected to the jurisdiction of the consular court of the United States, claiming that as a British subject his offense was justiciable only in the British consular courts. October 2, 1880, Mr. Drummond, under instructions from Earl Granville, wrote a long note to the Department, submitting the views of the British Government. Mr. Blaine replied June 16, 1881, sustaining the jurisdiction of the United States. A portion of the note is found in 1 Wharton's International Law Digest, pp. 811, 813.

The note of the Secretary of State also calls attention to the British merchant shipping act of 1854, and to the case of the *Queen* v. *Anderson* (1st Law Rep.), and then continues:

> I do not, however, desire to conduct this correspondence in any controversial spirit. My object is to point out that the position taken by the Government of the United States is in entire conformity

with the principles of English law as applied to a mercantile service almost identical with our own in its organization and regulation. That principle is that when a foreigner enters the mercantile marine of any nation and becomes one of the crew of a vessel having undoubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and in return for the protection afforded him becomes subject to the laws by which that nation in the exercise of an unquestioned authority governs its vessels and seamen. If, therefore, the Government of the United States has by treaty stipulation with Japan acquired the privilege of administering its own laws upon its own vessels and in relation to its own seamen in Japanese territory, then every American vessel and every seaman of its crew are subject to the jurisdiction which by such treaty has been transferred to the Government of the United States.

If Ross had been a passenger on board of the *Bullion*, or if, residing in Yokohama, he had come on board temporarily and had then committed the murder, the question of jurisdiction would have been very different. But, as it was, he was part of the crew, a duly enrolled seamen under American laws, enjoying the protection of this Government to such an extent that he could have been protected from arrest by the British authorities, and his subjection to the laws of the United States can not be avoided just at the moment that it suits his convenience to allege foreign citizenship. The law which he violated was the law made by the United States for the government of United States vessels; the person murdered was one of his own superior officers whom he had bound himself to respect and obey, and it is difficult to see by what authority the British Government can assume the duty or claim the right to vindicate that law or protect that officer.

The mercantile service is certainly a national service, although not quite in the sense in which that term would be applied to the national Navy. It is an organized service, governed by a special and complex system of law, administered by national officers, such as collectors, harbor masters, shipping masters, and consuls, appointed by national authority. This system of law attaches to the vessel and crew when they leave a national port and accompanies them round the globe, regulating their lives, protecting their persons, and punishing their offenses. The sailor, like the soldier during his enlistment, knows no other allegiance than to the country under whose flag he serves. This law may be suspended while he is in the ports of a foreign nation, but where such foreign nation grants to the country which he serves the power to administer its own laws in such foreign territory, then the law under which he enlisted again becomes supreme.

* * * * *

The identity of the system of mercantile marine law in the two countries, the conformity of thought and habits between our people, and our community of interest in the East as Christian and commercial nations, induce the Government of the United States to hope that upon a review of the consideration now submitted Her Britannic Majesty's Government will recognize the advantages both to Great Britain and the United States, and to China and Japan, of maintaining the principle of consular jurisdiction as it has been heretofore applied.

So impressed is this Government with the importance and propriety of these views, that while it will receive with the most respectful consideration the expression of any different conviction which Her

Britannic Majesty's Government may entertain, it will yet feel bound to instruct its consular and diplomatic officers in the East, that in China and Japan the judicial authority of the consuls of the United States will be considered as extending over all persons duly shipped and enrolled upon the articles of any merchant vessel of the United States, whatever be the nationality of such person.

And all offenses which would be justiceable by the consular courts of the United States, where the persons so offending are native born or naturalized citizens of the United States, employed in the merchant service thereof, are equally justiceable by the same consular courts in the case of seamen of foreign nationality. MSS. State Dep.

The doctrine sustained in the foregoing note is now incorporated into the permanent regulations of the State Department. (See U. S. Consular Regulations, secs. 72, 73.)

III.

THE APPELLANT, ALTHOUGH AN ALIEN, IS NEVERTHELESS AMENABLE TO THE LAW OF THE UNITED STATES.

In 1792 Mr. Jefferson, as Secretary of State, considering the subject of impressment, says: "The simplest rule will be that the vessel being American shall be evidence that the seamen on board her are such." (3 Wharton Int. Law, sec. 331.)

The war of 1812 and the negotiations preceding and following that contest established the position of all seamen sailing under the flag of the United States. That

position is in accordance with the declaration of Mr. Webster made in 1842, that—

> In future in every regularly documented American merchant ship the crew who navigate it will find their protection in the flag which is over them. (*Ibid.*)

The distinction sought to be made by the learned counsel for the appellant between an American seaman and a citizen of the United States is not supported. The seaman of our merchant ship is entitled to the law's protection and is subject to its penalties; he receives the benefits and is subject to the obligations of a limited citizenship. An alien, protected by our flag, may not commit a crime against a citizen, or against the laws of the country of the flag, and claim exemption from the penalties of the violated law by reason of his alienage.

Wharton in his Criminal Law extracts from the decisions the following rules:

> § 269. As a rule a ship is viewed as part of the country whose flag she bears; and in conformity with this principle, all offenses committed on shipboard are regarded as cognizable by the sovereign to whom the ship belongs, no matter to what nationality belongs the offender. In England, it is true, all rivers in the country, until they flow past the furthest point of land next the sea, are held within the jurisdiction of the courts of common law, and not of the court of admiralty; and where the sea flows in between two points of land in the country, a straight imaginary line being drawn from one point to the other, the common law is held to have jurisdiction of all offenses committed within that line, the court of admiralty of all offenses without it. But of crimes not merely on

the high seas, but on creeks, harbors, ports, etc., in foreign countries, the court of admiralty is held to have undoubted jurisdiction, and such offenses may consequently be piracies. Thus, where on an indictment for larceny out of a vessel lying in a river at Wampu, in China, the prosecutor gave no evidence as to the tide flowing or otherwise where the vessel lay; the judges held that the admiralty had jurisdiction, it being a place where great ships go. As to offenses committed on the coast, the admiralty is ruled to have exclusive jurisdiction of offenses committed beyond low-water mark; and between that and the high-water mark, the admiralty jurisdiction is asserted over all offenses done upon the water when the tide is in; it being admitted that courts of common law have jurisdiction over offenses committed upon the strand when the tide is out. All the other parts of the high sea are indisputably within the jurisdiction of the admiralty.

Since the passage of the merchants' shipping act, in 1854, British jurisdiction is pushed so far as to embrace offenses committed by British seamen abroad, in port as well as on ship. Since this act it has been held that the English common law courts have jurisdiction of offenses committed on British ships in foreign rivers or at sea, though the offenders be foreigners.

The same general principles are admitted in German and French jurisprudence.

§ 270. In the United States, by statute, the Federal courts have jurisdiction not only of all piracies, revolts, homicides, robberies, and malicious injuries to vessels, and of other crimes, on the high seas, by all persons without regard to nationality, but of offenses committed in American ships in foreign ports; "and the trial of crimes committed on the high seas *or in any place out of the jurisdiction of any particular State shall be in the district where the offender is*

> *apprehended or into which he may be first brought.*" And this act gives concurrent jurisdiction to the place of arrest and that in which the defendant is first brought.

In *The Queen* v. *Anderson*, reported in vol. 1 of the "English Law Reports of Crown Cases Reserved," p. 16, the doctrine is forcibly maintained by all the judges to whom the question had been referred, that the courts of Great Britain had jurisdiction over, and British law prevailed in regard to, all offenses committed on board British merchant ships, by *whomsoever committed*. In this case an American citizen, serving on board a British ship, caused the death of another American citizen serving on board the same ship, under circumstances amounting to manslaughter, the ship at the time being in the river Garonne, within French territory, at a place below bridges and where great ships went. The French authorities refused to take jurisdiction. The court held unanimously, "That the ship was within the admiralty jurisdiction" (of Great Britain) "and that the prisoner was rightly tried and convicted at the central criminal court."

And see 4th Lawrence's *Commentaire sur Wheaton* (p. 80); 2*d Phillimore's International Law* (p. 309).

In the case of *United States* v. *Holmes* (5 Wheat., 412) it was held that—

> If it [the offense] be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, the offender is to be considered *pro hoc vice*, and, in respect to this subject, as belonging to the nation under whose flag he sails.

It is believed to be in accordance with the rules of all maritime nations that a seaman of a documented ship shall be considered for the time being a seaman and a subject of the nation to which the vessel belongs.

IV.

THE PROCEDURE OF CONSULAR COURTS IS NOT UNCONSTITUTIONAL.

In a communication made by Mr. Fish, Secretary of State, to Mr. De Long, December 20, 1870, a view of the Japanese consular courts is presented, as follows:

> A report made to Congress by my predecessor, Mr. Seward (a copy of which is inclosed), shows that it has been the habit of this Department to regard the judicial power of our consular officers in Japan as resting upon the assent of the Government of that kingdom, whether expressed by formal convention or by tacit acquiescence in the notorious practice of the consular courts. In other words, they were esteemed somewhat in the same light as they would have been if they were constituted by the Mikado with American citizens as judges, and with all the authority with which a Japanese tribunal is invested in respect to the native subjects of Japan, to the extent that our Government will admit a jurisdiction understood to be extremely arbitrary. They were, so to speak, the agents of a depotism, only restrained by such safeguards as our own Government may interpose for the protection of citizens who come within its sway. (Whar. Int. Law., p. 806.)

The admiralty courts and courts of maritime jurisdiction are not courts that originally or in their nature in-

clude a trial by jury. A statute which grants the use of a jury in maritime cases, civil or criminal, adds to the ancient and natural methods of procedure in such courts.

The Constitution recognizes those courts as they existed when it was formed, and it does not change their organization or methods.

Juries belong to the procedure of the common law.

The right of trial by jury secured by the Constitution was as it existed and was understood in England and in this country at the Declaration of Independence. 2d Hare's Constitutional Law (pp. 860, 872). See also, 18 How., 262; 104 U. S., 133.

In equity, admiralty, and maritime cases, if a jury is employed, its use is subordinate, incidental, by special rule or by order or by the grace of a statute and is not in pursuance of any ancient and original right.

Clause 3 of section 2, article 3, of the Constitution, declaring that "The trial of all crimes, except in cases of impeachment, shall be by jury," relates only to cases of trial in common law courts; and the speedy and public trial by an impartial jury, directed in article 6 of the amendments, relates to a common law trial only.

Legislation gives no jury to the Oriental consular courts and omits to require their use, hence neither indictment nor trial by juries is authorized.

The provision for the four associates precludes any theory that the statute contemplates any use of a common law trial jury in Japan.

It is fair to infer that the clause which requires presentment by a grand jury relates only to the States, and per-

haps to territory in which Congress shall have provided a methodical administration of the law.

By Article 6 the Constitution, the laws made in pursuance thereof, and all treaties shall be the supreme law of the land.

It can hardly be contended that the Constitution is extra-territorial and extends into Japan, or that, to the destruction of an act of Congress in relation to maritime affairs, it necessarily follows a citizen into the bays and harbors of the foreign nation. It would be an extreme extension of the fundamental law of our country to hold that a seaman, claiming foreign birth, when borne in irons out of the foreign harbor to the contiguous shore for the murder of a citizen, is so protected there by our Constitution that he may not be tried for the crime at the place and before the tribunal provided by Congress.

The President is empowered, with the aid of the Senate, to make treaties, and appoint ministers and consuls.

Congress is given power "to regulate commerce;" and "to constitute tribunals inferior to the Supreme Court;" and "to define and punish piracies and felonies committed on the high seas" and "to make all laws which shall be necessary and proper for carrying into execution," etc.

The judicial power not vested in the Supreme Court shall be in such inferior courts as the Congress may from time to time ordain and establish; and the judicial power shall extend to all cases of admiralty and maritime jurisdiction.

Section 5372 (Rev. Stat.) so *defines* piracy as to constitute Ross a pirate upon the death of Kelly; it prescribes his punishment to be death.

Inferior (consular) courts, whether maritime in their nature, or otherwise are established for such trials, and Ross is tried and convicted in pursuance of the Congressional enactments establishing such courts.

Whether the authority be drawn from one of the grants contained in the Constitution, or whether it he held to result from several powers granted, there can be no reasonable ground for asserting that the right to enact laws establishing consular courts in oriental countries, and the right to give judicial powers to consular representatives in barbarous lands, do not exist.

It must be considered a matter of common knowledge that it is practically impossible in those countries to organize a grand jury for indictment or presentment; in some of them it is entirely impracticable to obtain a proper, legally constituted trial jury; it is therefore a necessity to omit the employment of juries.

This necessity and the consequent practice had existed ever since civilized people had carried on commercial intercourse with such countries.

For centuries before the existence of the American Constitution representatives of civilized and maritime nations, in their nature consular officers, were authorized to perform and did perform for their governments duties of the character of those authorized to be performed by consular officers of this Government by the statutes in question.

See *Warden's Consular Establishments; Van Dyck's Capitulations* (Sen. Doc. No. 3, Spec. Sess. 1881); *Tarring's British Consular Jurisdiction in the East.* (Lond. 1887, Chap. 1.)

When that instrument was created consuls were, in many parts of the world, exercising powers analogous to those given by these statutes. It must, therefore, be inferred that when the Constitution authorized the making of treaties and the appointment of consuls, the framers had in mind consuls as they then existed; and the implication is reasonable, and even necessary, that these officials were to be clothed, as the occasion might arise, with powers similar to those exercised by consular officers of other nations similarly placed.

The special and important authority and services of these officers were recognized by all nations and employed by many.

The Constitution does not prescribe the qualifications or duties of a consul or limit his powers; it authorizes his existence as a national officer, and leaves the rest to the common knowledge of the public and to the discretion of the law-making power.

In a letter addressed to the Hon. William Windom, chairman Committee on Foreign Relations, by Mr. Secretary of State Frelinghuysen, under date of April 29, 1882 (Forty-seventh Congress, first session, Miss. Doc. No. 89), the constitutionality of judicial power given to consuls is considered as follows:

10. *Constitutionality of this measure.*

> It has been suggested in some quarters that the present laws infringe upon the Constitution. I beg to trespass on the time of the committee a little more while I notice this doctrine, which I can not but regard as erroneous.

The Constitution, by its terms, is ordained and established "for the United States of America." The places in which laws of this class are in force are out of the United States and form no part of our domain.

The Constitution, and the laws of the United States made in pursuance of it and treaties made under its authority, are to be the supreme law of the land; but not of any other land, nor for American citizens living in any other land.

That the framers of the Constitution so understood it we may gather from contemporaneous evidence. Two treaties granting extraterritorial rights were concluded nearly simultaneously with the adoption of the Constitution. The first (the treaty with Morocco, of January, 1787) provides that if citizens of the United States in Morocco have disputes with each other the consul shall decide between the parties. The second (the treaty with France of November 14, 1788, negotiated by Jefferson) contained a provision that all differences and suits between citizens of the United States in France should be determined by the consuls and vice-consuls, either by a reference to arbitrators or by summary judgment without costs. This treaty was submitted to the Senate by President Washington on the 11th of June, 1789, and was unanimously accepted by that body on the 29th of the following July.

In the 60 years which intervened prior to the passage of the act of 1848 treaties conferring extraterritorial rights were concluded with Algiers, with China, with Moracco (extending the treaty of 1787), with Muscat, with Tripoli, with Tunis, and with Turkey; but no attempt was made to carry the jury system of the United States into any of those countries, and no law of any kind was enacted on this subject until the law of August, 1848, was passed.

When this law was enacted Congress had for its guide the French system of assessors and the British laws, which had copied that system. Great Britain seemed to have arrived at the conclusion that juries were there impracticable. Congress apparently accepted that conclusion and copied in principle the French and English systems. The statesmen of those days, in a Senate of which Mr. Webster, Mr. Calhoun, Mr. Badger, Mr. John Davis, Mr. Jefferson Davis, Mr. Clayton, Mr. Benton, and Mr. Reverdy Johnson were members, and a House containing men like Mr. Charles Ingersoll, Mr. Jos. Ingersoll, Mr. McLane, Mr. Ashmun, General Schenck, Mr. Alexander Stephens, and Mr. Robert C. Winthrop, passed this act unanimously, without a question as to the constitutional right to do so. In 1860 another Congress reënacted it, with some amendments and other provisions added to it, as has already been shown. In 1870 it was again the subject of consideration, when appeals were granted to the district court for California. Finally, in 1873, the provisions were again reënacted in the Revised Statutes.

Still further, the constitutionality of these laws has been the subject of a judicial decision in the circuit court of the United States for the ninth circuit, and has been fully sustained by Mr. Justice Field in an elaborate and exhaustive opinion.

Thus we find a harmony of sentiment between the early executive action contemporaneous with the forming of the Constitution, the later executive action by those who were familiar with or took part in forming it, the legislative action by successive Congresses for more than a generation, and the judicial action of an eminent member of the Supreme Court. This justifies us in thinking that the treaties in question, instead of extending the provisions of the Constitution over the territories of the powers with which

they were negotiated, operated to take out of the jurisdiction of the local courts either the civil disputes of citizens of the United States or the criminal offenses committed by them, or both. It would work great injustice to hold that they operated to put those civil disputes beyond the reach of process or those offenses beyond the reach of punishment until juries could be organized under authority of law.

Yet no one will question that, even admitting the power of Congress to decline to confer the right of trial by jury in such cases, the spirit of our institutions calls for laws conferring those rights when it becomes practicable to grant them. The British system of laws, which we copied in 1848, has widely departed from its then model, and has been more and more adapted to the English jury system.

* * * * *

I have the honor to be, sir, your obedient servant,
FRED'K T. FRELINGHUYSEN.

It can not be said that the consular-courts statutes are modified or rendered void by any other section of the Revised Statutes or by any statutory enactment, because the statutes under consideration are independent in their nature and explicit in their terms.

They must be held to be valid and effectual unless they are declared to be unconstitutional. The fact that the consular-court laws have existed for a long period of years without serious legal question is to be considered in favor of their legality.

If the laws here questioned are void, section 4088 is also void; and a consul "at islands or in countries not inhabited by any civilized people" would be powerless to

enforce law, as the situation and surroundings would preclude the presentment by a grand jury as well as a formal trial by a qualified trial jury.

Under date of September 19, 1855, the Hon. Caleb Cushing, then Attorney-General, gave an official opinion (7 Opin. A. G., 495), wherein he presents an elaborate study of the civil and criminal judicial jurisdiction of American consuls in China.

It is evident that our treaty with Japan is copied from that made with China, and nearly similar powers are given to our consuls in the respective countries. An incidental consideration is also given to the treaty with the Ottoman Porte, and to the duties of consuls in Turkey.

This learned lawyer discusses the several powers granted, and plainly sustains this legislation.

It is not apparent that the possibility of claim of right to attach the jury system of the United States to its consular officers located beyond the pale of Christendom occurred to this experienced public jurist.

In the case of *In re Joseph Stupp* (11 Blatch., 124) certain specified treaties, and the consular practice in pursuance thereof and of the laws of Congress, are considered in the opinion by Judge Blatchford (p.145), as follows:

> On the 7th of May, 1830, the United States made a treaty with the Ottoman Porte, commonly called Turkey (8 U. S. Stat. at Large, 409), which contains a provision, in the fourth article, that citizens of the United States committing an offense in Turkey "shall not be arrested and put in prison by the local authorities, but shall be tried by their minister or

consul, and punished according to their offense, following, in this respect, the usage observed towards other Franks." No law of the United States was passed to carry that provision into practical effect until the year 1848. Meantime, before the extradition convention with Prussia was made, and on the 3d of July, 1844, a treaty was made between the United States and China (8 U. S. Stat. at Large, 596), the twenty-first article of which provides, that "citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the consul, or other public functionary of the United States thereto authorized, according to the laws of the United States." In view of those two treaties, one made in 1830 and the other in 1844, the Congress of the United States, on the 11th of August, 1848, passed an act (9 U. S. Stat. at Large, 276), entitled, "An act to carry into effect certain provisions in the treaties between the United States and China and the Ottoman Porte, giving certain powers to ministers and consuls of the United States in those countries." That act was passed four years before this treaty was made with Prussia, and it gives to the commissioner and the consuls of the United States (the chief functionary of the United States in China at that time being called a commissioner and a minister), appointed to reside in China, power to try, in the manner provided in the act, all citizens of the United States charged with offenses against law, that is, against the law of China, committed in the dominions of China.

The second section of that act provides "that in regard to crimes and misdemeanors the said public functionaries are hereby fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offenses against law which shall be committed in the dominions of

China, including Macao, and, upon conviction, to sentence such offenders in the manner herein authorized; and said functionaries and each of them are hereby authorized to issue such processes as are suitable and necessary to carry this authority into execution." The act also extends the laws of the United States, so far as is necessary to execute the treaty, over all citizens of the United States in China, so far as such laws are suitable to carry the treaty into effect. It also authorizes the consuls of the United States in China to arrest any citizen of the United States charged with committing in China an offense against law and to try him, and, on conviction, to punish him by fine or imprisonment; and in cases of murder and insurrection or rebellion against the Chinese Government, with intent to subvert the same, to punish the offense with death, by executing the convict, if the commissioner shall issue a warrant for the purpose.

The act also gives the same powers to the minister resident and consul of the United States in Turkey, in reference to crimes committed by citizens of the United States in Turkey, under the treaty of May 7, 1830. It is to be noted that this act was passed on the day before the act of the 12th of August, 1848, was passed, (9 U. S. Stat. at Large, 302), which is one of the acts under which the proceedings in the present extradition case are taking place. This act of August 12, 1848, prescribes the course of procedure in the United States under extradition treaties, and provides for the issuing of a warrant and the holding of an examination, with a view to extradition, where complaint is made, charging "any person found within the limits of any state, district, or territory with having committed, within the jurisdiction of any such foreign government, any of the crimes enumerated or provided for by any such

treaty or convention." These treaties and the act to carry them into effect were in force when the convention with Prussia was made, in 1852.

A treaty was also made between the United States and Borneo, on the 23d of June, 1850, but not proclaimed until the 12th of July, 1854 (10 U. S. Stat. at Large, 910), the ninth article of which provides that, "in all cases where a citizen of the United States shall be accused of any crime committed in any part" of the dominions of the Sultan of Borneo, "the person so accused shall be exclusively tried and adjudged by the American consul, or other officer duly appointed for that purpose." It does not appear that any law of the United States has been passed to carry this provision into effect.

Then a treaty was made with Siam, on the 29th of May, 1856 (11 U. S. Stat. at Large, 684), the second article of which provides that "criminal offenses will be punished, in the case of American offenders, by the consul, according to American laws."

Then came a treaty with Japan, of June 17, 1857, (11 U. S. Stat. at Large, 723), the fourth article of which provides that "Americans committing offenses in Japan shall be tried by the American consul-general or consul, and shall be punished according to American laws."

On the 29th of July, 1858, another treaty was made with Japan (12 U. S. Stat. at Large, 1056), the sixth article of which provides that "Americans committing offenses against Japanese shall be tried in American consular courts, and when guilty, shall be punished according to American laws."

These treaties with Japan and Siam, of 1856, 1857, and 1858, made necessary a further act of Congress, and an act was passed on the 22d of June, 1860 (12 U. S. Stat. at Large, 72), covering the provisions of the treaties with China, Japan, Siam, and

Turkey, in reference to criminal offenses, and superseding the act of August 11, 1848. This act of the 22d of June, 1860, contains substantially the same provisions which were embraced in the act of August 11, 1848, applied to offenses committed by citizens of the United States in China, Japan, Siam, and Turkey, and providing for the jurisdiction of such offenses by the ministers and consuls of the United States in those countries. This act has been put into practical execution. It appears by the diplomatic correspondence of the United States that one David Williams was tried and convicted in the consular court at Shanghai for piracy and murder in robbing and killing three Chinese. The United States minister to China, on the 23d of November, 1863, issued a warrant for his execution. On the 1st of March, 1864, a few hours before the time fixed for his execution, he committed suicide. One James White was tried and convicted in the consular court of Shanghai, on the 23d of November, 1863, of the murder of Samuel Webster. A warrant was issued for his execution, but he broke jail and escaped owing to the insufficient means provided for taking care of prisoners.

A third, and more remarkable, case was that of John D. Buckley, who, on the 22d day of May, 1863, murdered, at Shanghai, John McKennon, a citizen of the United States and the master of an American merchant ship. After the offense was committed, Buckley, under another name, took passage, at Shanghai, for Havre, in France, on board of a French vessel. The vessel stopped at Nagasaki, in Japan. The American consul at Nagasaki applied to the French consul there for permission to arrest Buckley. The French consul arrested Buckley and put him in the French prison at Nagasaki, and the vessel went to

France without him. The French consul laid the case before the French minister in Japan. He declined to surrender Buckley to the American minister in Japan, on the ground that, under the extradition treaty between the United States and France, the surrender of the fugitive must be made by the French Government at home on the demand of the American Government, but he offered to send Buckley to France to await a demand there. The American minister in Japan then arranged to arrest Buckley when he should be discharged from the French custody in Nagasaki, and to send him to Shanghai to be delivered to the American consul there, and the captain of a British Government steamer agreed to take Buckley to Shanghai under guard when he should be arrested. This was early in January, 1864. Shortly afterwards Buckley surrendered himself to the American consul at Nagasaki, and was sent to Shanghai in such British Government steamer. He was tried at Shanghai for the murder, on the 1st of February, 1864, before the American consul-general and four associates, and was convicted and sentenced to be hung. The United States minister in China, on the 11th of March, 1864, issued a warrant for his execution, and he was hung at Shanghai on the 1st of April, 1864. The proceedings in Buckley's case were approved by the President. (*Diplomatic Correspondence* of 1864, part 3, pages 392 to 419, 440, 474, 478, 479.)

On the 14th of February, 1867, a treaty was made between the United States and Madagascar (15 U. S. Stat. at Large, 492), the fifth article of which provides, that citizens of the United States shall, as to criminal offenses committed by them in Madagascar, be under the exclusive criminal jurisdiction of their own consul only, duly invested with the necessary powers. By the act of July 1, 1870 (16 U. S. Stat. at Large, 183), the act of July 22, 1860, before men-

tioned, is, so far as it is in conformity with the stipulations of the said treaty with Madagascar, extended to that country, and to any country of like character, with which the United States may thereafter enter into treaty relations.

Such are the law and the facts in regard to these treaty provisions, the acts of Congress thereon, and the practical execution of them, in respect to the jurisdiction specially conferred, by treaty, upon officers of the United States, in regard to crimes committed by citizens of the United States, wholly out of the physical territory of the United States, and not on board of vessels of the United States.

The third subject to which I referred was, prior and subsequent laws of the United States respecting the jurisdiction of the United States over crimes not committed within the physical territory of the United States other than laws passed in pursuance of treaties, as showing an assumption by the United States of jurisdiction over offenses committed outside, not only of the physical territorial limits of the United States, but outside of the *quasi* territorial limits of the United States, and outside of territorial limits granted by treaty.

We are entirely familiar with the jurisdiction exercised over offenses committed on vessels, a vessel being regarded as a part of the country whose flag she bears.

The legality of the treaties, enactments, and trials, above referred to stands unquestioned, although juries are entirely ignored.

A contention that an American seaman may be constitutionally tried in the consular court without juries for a crime committed on the wharf, but that as to a similar

crime committed on board a ship lying at anchor in the harbor the rule is reversed, would seem, under the treaty and statutes, to be too artificial to merit consideration.

The jurisdiction of consular courts is recognized in *Steamer Spark* v. *Le Choi Chum* (1 Saw., 713); *Tazaymon* v. *Twombley*, (5 *id.* 79); *The Ping-on* (7 *id.* 483); *The Ping-on, etc.* (11 Fed. Rep. 607).

In *United States* v. *Craig* (28 Fed. Rep. 801), the court, by Judge Brown, said:

> Our own statutes upon the subject of foreign relations vest in the ministers and consuls of the United States residing in semi-civilized countries a complete civil and criminal jurisdiction, extending even to capital offenses.

In the *United States* v. *Smiley* (6 Saw., 645), the court, by Mr. Justice Field, says:

> The criminal jurisdiction of the Government of the United States, that is, its jurisdiction to try parties for offenses committed against its laws, may in some instances extend to its citizens everywhere. Thus it may punish for violation of treaty stipulations by its citizens abroad, for offenses committed in foreign countries where, by treaty, jurisdiction is conceded for that purpose, as in some cases in China and in the Barbary States; it may provide for offenses committed on deserted islands and on an uninhabited coast by the officers and seamen of vessels sailing under its flag. It may also punish derelictions of duty by its ministers, consuls, and other representatives abroad. But in all such cases it will be found that the law of Congress indicates clearly the exterritorial character of the act at which punishment is aimed.

In *Dainese* v. *Hale* (91 U. S., 13) the opinion of this court, delivered by Mr. Justice Bradley, says that while it is—

> Conceded that in Pagan and Mahometan countries it is usual for the ministers and consuls of European states to exercise judicial functions as between their fellow-subjects or citizens, it clearly appears that the extent to which this power is exercised depends upon treaties and laws regulating such jurisdiction. * * *
>
> Historically, it is undoubtedly true, as shown by numerous authorities quoted by Mr. Warden in his treatise on The Origin and Nature of Consular Establishments, that the consul was originally an officer of large judicial as well as commercial powers, exercising entire municipal authority over his countrymen in the country to which he was accredited.

Reference is made to the treaty entered into with the Ottoman Porte, and that made with China, as well as to the act of 1848 (9 Stat. 276), and that of 1860 (12 Stat. 72) intended to carry them into effect.

While the case then before this court was a civil suit brought up by writ of error, the breadth of the judicial authority given to consuls is recognized without criticism.

It is stated that:

> The State Department of the United States seems to have regarded the treaty of 1830 as establishing the jurisdiction in question. In the instructions contained in the "Consuls' Manual," promulgated by the Department in December, 1862 (adopting the learned opinion of Attorney-General Cushing, dated October 23, 1855), it is said that the acts of Congress of 1848 [and 1860] provide in terms for the exercise of judicial authority by ministers and consuls in Turkey

only so far as regards the punishment of crime, leaving the question of civil jurisdiction to stand upon treaties or the peculiar public law of the Levant.

No attention is given to the fact that neither grand nor traverse juries are to be employed.

In *Mahoney* v. *United States* the opinion by Mr. Justice Field (10 Wall. 66, 67) makes mention of the judicial duties of United States consuls to Mohammedan countries.

V.

Counsel for the appellee begs to submit his case upon the three principal questions raised by the appellant on this appeal, upon the practical interpretations, arguments, and statements quoted in points II, III, and IV of this brief, without further comment.

It is submitted on behalf of the appellee that the order of the court below should be sustained:

Because the prisoner is held upon an accepted warrant of pardon of continuing force.

And it is submitted:

That the consular court had legal jurisdiction of the offense charged, and also of the person of the appellant, notwithstanding his alleged alienage.

It is also submitted:

That the appellant was tried in accordance with law; and that no constitutional right, to him belonging, was violated.

A. X. PARKER,
Assistant Attorney-General.

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In the Supreme Court of the United States.

JOHN M. ROSS, APPELLANT,
vs.
JAMES McINTYRE, SUPERINTENDENT, etc.
No. 1683.

SUPPLEMENTAL, ON BEHALF OF APPELLEE, IN ANSWER.

As the brief filed on behalf of the appellant did not reach counsel for appellee until after his brief had been printed, a few words in reply may be properly submitted.

I.

While the treaty concluded with Japan in 1858 is the one directly relied upon, its grants are to be construed in part by a reference to that concluded in 1857.

PROVISIONS OF THE TREATY WITH JAPAN, PROCLAIMED MAY 22, 1860.

In Article 1 (12 Stat., p. 1052) it is agreed that:

> The President of the United States may appoint a diplomatic agent to reside at the city of Yedo, and consuls or consular agents to reside at any or all of the ports in Japan which are open for American com-

merce by this treaty. The diplomatic agent and consul-general of the United States shall have the right to travel freely in any part of the Empire of Japan from the time they enter on the discharge of their official duty.

Article 3 (p. 1053) provides for harbor regulations, as follows:

> The place which the Americans shall occupy for their buildings, and the harbor regulations, shall be arranged by the American consul and the authorities of each place, and if they can not agree the matter shall be referred to and settled by the American diplomatic agent and the Japanese Government.

Article 6 is in part as follows:

ARTICLE VI.

> Americans committing offenses against Japanese shall be tried in American consular courts, and when guilty shall be punished according to American law. Japanese committing offenses against Americans shall be tried by the Japanese authorities and punished according to Japanese law. The consular courts shall be open to Japanese creditors, to enable them to recover their just claims against American citizens, and the Japanese courts shall in like manner be open to American citizens for the recovery of their just claims against Japanese.

Article 9 is as follows:

ARTICLE IX.

> When requested by the American consul, the Japanese authorities will cause the arrest of all deserters and fugitives from justice, receive in jail all persons

held as prisoners by the consul, and give to the consul such assistance as may be required to enable him to enforce the observance of the laws by the Americans who are on land, and to maintain order among the shipping. For all such service, and for the support of prisoners kept in confinement, the consul shall in all cases pay a just compensation.

Attention is called to the fact that by article 12 (p. 1059) the provisions of the treaty of Simoda, proclaimed June 30, 1858, are saved and incorporated in this treaty of Yeddo, as follows:

ARTICLE XII.

Such of the provisions of the treaty made by Commodore Perry, and signed at Kanagawa on the 31st of March, 1854, as conflict with the provisions of this treaty are hereby revoked; and as all the provisions of a convention executed by the consul-general of the United States and the governors of Simoda, on the 17th of June, 1857, are incorporated in this treaty, that convention is also revoked.

It is submitted that the views of the learned counsel for the appellant (brief, p. 16) are not correct.

It does not appear that the restrictions of the treaty of Yedo have escaped the notice of Congresses and courts and Secretaries of State, but it is evident that the latter treaty has been construed by those concerned in carrying it into effect as granting practically the same powers to the United States as to consuls, courts, and judicial and general jurisdiction as were granted by the treaty of Simoda.

The granting of the consular rights distinctly given by the treaty, by necessary implication, would grant the right

of the usual consular jurisdiction as to Americans that existed in other nations.

Again, in a broad sense, the commission of shocking crimes by Americans upon Japanese soil or within the territory of Japan, in its harbors, are cases of "Americans committing offenses against Japanese."

Certainly an American seaman is not in position to object to the governmental acts of his country, authorized by law, if Japan acquiesces; and Ross is in the position of an American seaman.

Were the trial based upon an assumption of the United States, assented to by Japan, and authorized by an act of Congress, an American subject would be bound.

But it is submitted that the words of the treaty enlarged by the incorporation of the former treaty, as specified in Article 12, are all sufficient to carry the jurisdiction exercised.

II.

The theory of the appellee is that the crime committed in Yokohama harbor was committed in the territorial waters and within the territorial limits of Japan.

That while the United States courts would have had jurisdiction of the offense had the appellant been brought into its ports, yet the consular court, under the treaties and statutes and the customs of nations, had full authority and jurisdiction to try and punish the prisoner.

A. X. PARKER,
Assistant Attorney-General.

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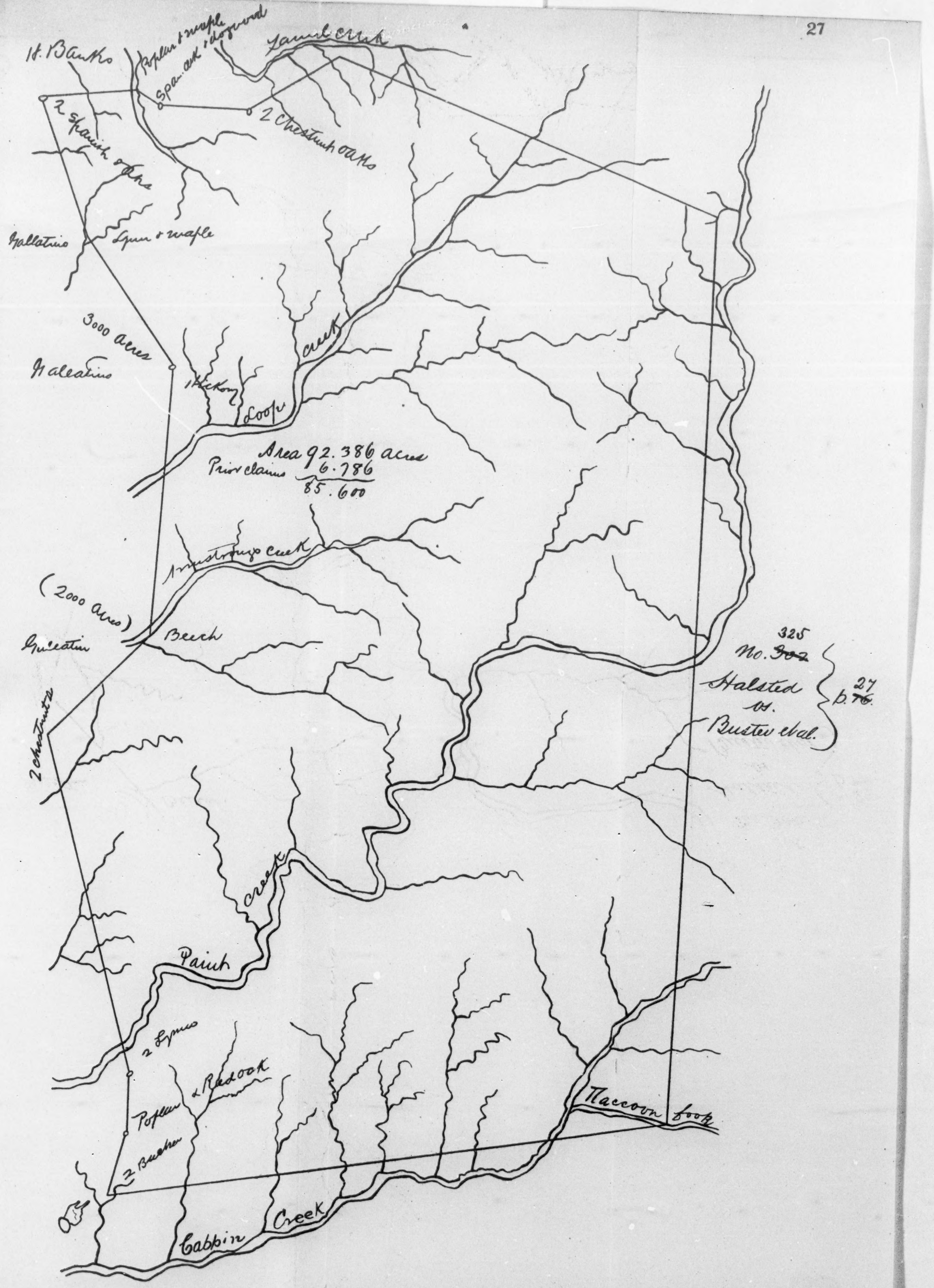
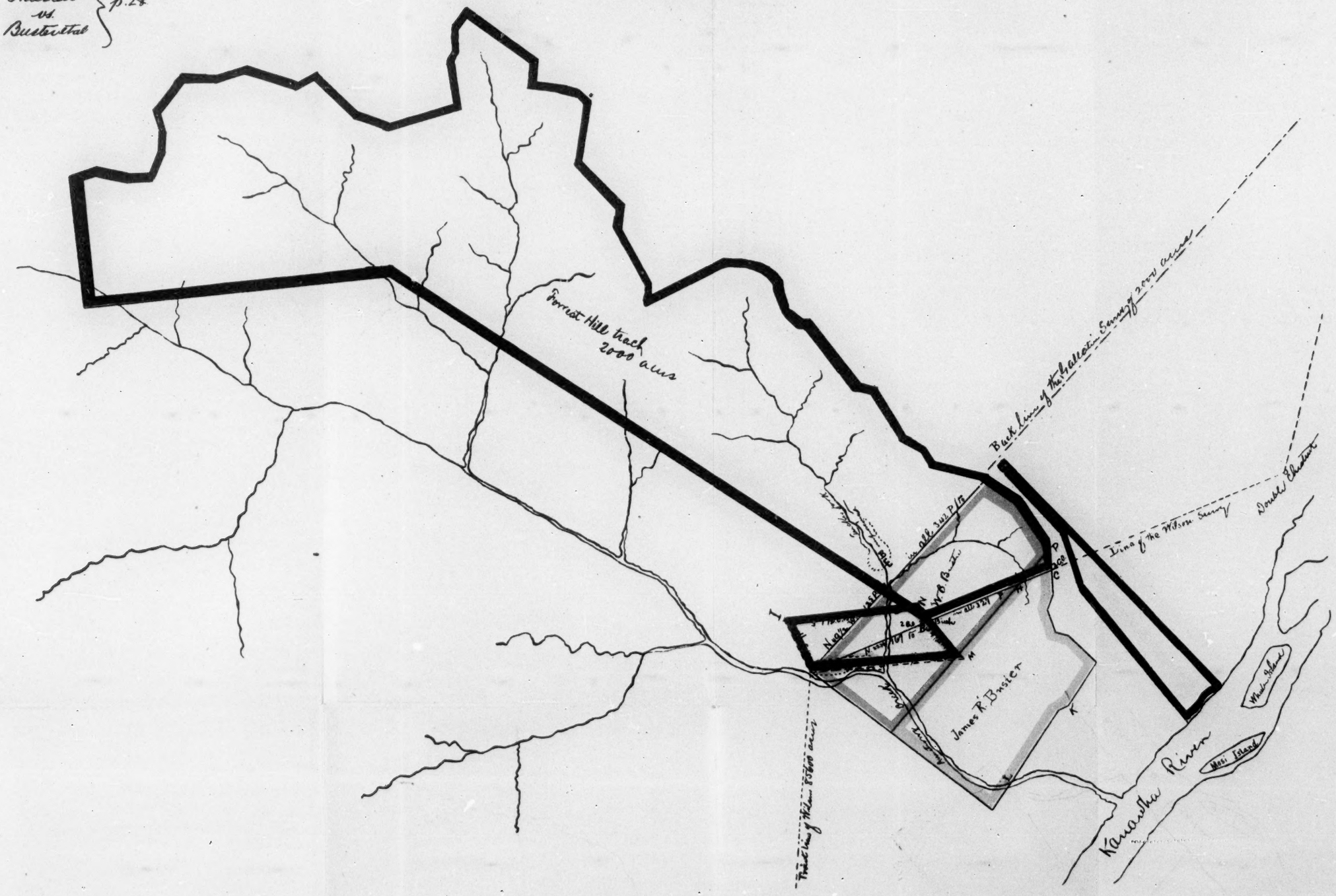

H. Banks
Poplar & maple
spa. oak & dogwood
Sand creek
2 Spanish oaks
2 Chestnut oaks
Gallatins
Gum & maple
3000 acres
Hallatins
Blackjack
Loop
creek
Area 92.386 acres
Prior claims 6.786
85.600
Armstrongs creek
(2000 acres)
Gallatins
Beech
2 Chestnuts
325
No. 302
Halsted
vs.
Buster et al.
27
p. 76.
creek
Paint
2 Gums
Poplar & Redoak
2 Beeches
Raccoon Fork
Cabbin Creek

325
No. 302.
Halsted
vs.
Buckstaff

41
p. 28

Exhibit B



Plat

No. 4

of

Wm. Wilson and A Gallatin Survey

MADE BY ORDER OF COURT NOV. 17/41

IN CAUSE OF

JOHN HALSTEAD

VS.

HEIRS OF Wm B. BUSTER

A. P. Summitt

No. 325
Halsted
v.
Bustervital.
} p. 41a

H BANKS
2 Spanish Oaks
POPLAR & MAPLE
Spon. Oak & Dogwood
LAUREL CREEK
2 CHESTNUT OAKS
GALLATIN HICKORY
Lamp
Creek
WILLIAM WILSON SURVEY OF 85.800 A.
KANAWHA
SUGAR & ELM
BEECH ELM
ALBERT GALLAT
GALLATIN BEECH
JAMESTOWN'S CREEK
FOREST HILL TRACT
2 CHESTNUTS
MORR'S CREEK
2 W OAKS
SYCAMORE
UPPER CREEK
LOWER CREEK
GOLLIN BR
BUZZARD BR
ASH BR
TOM'S BR
SYCAMORE
HURRICANE BR.
BRUSH BR.
CANE BR.
TEN MILE FORK
CREEK
FOUR MILE BR
JONES
MB
PAINT
SLICK ROCK BR
POPLAR & OAK
2 BEECHES
DRY BRANCH
PAINT BRANCH
GREENS BR
BEAR BRANCH
CANE BRANCH
RACCOON FORK
BEECH & SUGAR TREE
CABIN CREEK

325
No. ~~304~~.
Halsted
vs.
Butler et al.

70
b. 66.

Pike Creek

Tennessee Avenue

Cauchois Creek

Area 50,000 acres

Deep Creek

Hanauma River

2 addn

Pennie-Hill Tract
2000 Acres

Back Line of the Gallatin Survey of 2000 acres

Line of the Wilson Survey

Double Chestnut

Lease Line of Adams & Co.

Fork

Wm. B. Buster

N22 W

13

James R. Buster

Pennie Hill Front

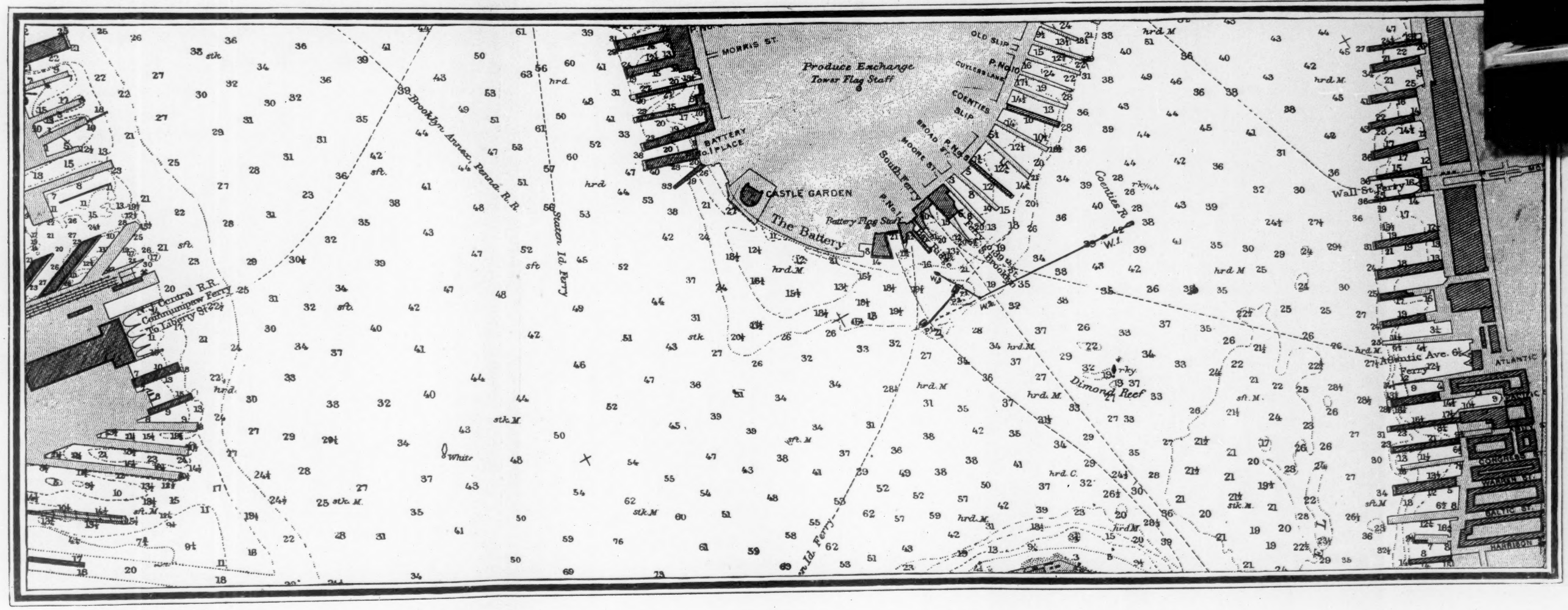
Middle Island

KANAWHA RIVER

Main Island

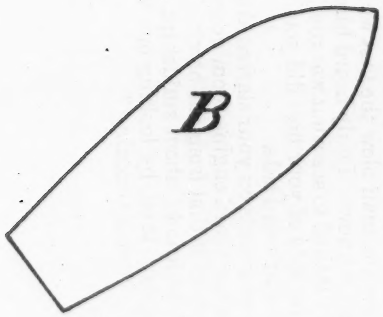
Front Line of Wilson 2000 Acres

No. 325.
Halstead
v.
Buster et al.
} p. 2 addn


MORRIS ST.
Produce Exchange
Tower Flag Staff
OLD SLIP
CUTLERS LANE
COENTIES SLIP
BROAD ST.
MOORE ST.
South Ferry
BATTERY PLACE
CASTLE GARDEN
The Battery
Battery Flag Staff
Brooklyn Annex, Penna. R.R.
Coenties R.
Wall St. Ferry
Atlantic Ave. Ferry
Diamond Reef
Communipaw Ferry
To Lafayette St.
White
Old Ferry
ATLANTIC
HARRISON

Slover's Diagram J. H. F.
Case of the "E. A. Packer."

No. 286.
"E. A. Packer" } p. 38
N. J. L. Leo.



Coenties R
W.1.
W.2.
W3
P1
P2
P3
39th St.
Brooklyn
Ferry
South Ferry
Bay Ridge
P. No. 1
Battery Flag Staff
GARDEN
hrd.M.

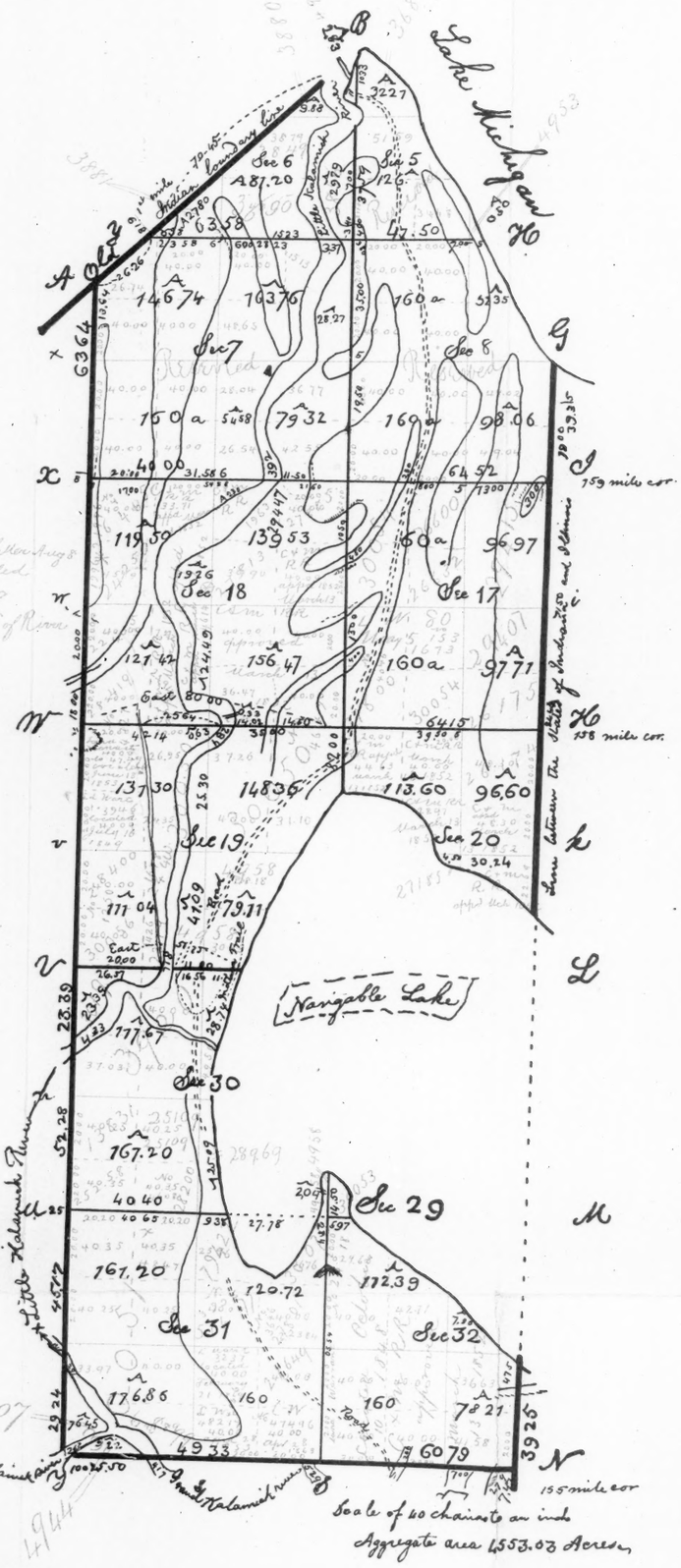
3

Plaintiffs Ex "B"

No. 167
P. 64

4

Township 37 North of the base line Range 15 East of the 3rd principal Meridian



also p. 118
in No. 161

Surveyors Office
St Louis March 18th 1836

The above plat of said Township 37 North Range 15 East of the 3rd Principal Meridian is conformable to the field notes of the Survey thereof on file in this Office

E J Langham

Exhibit 4.

MAP SHOWING TOPOGRAPHY
IN SECTIONS 19.20.29.30. IN TOWN 37.
NORTH RANGE 15 E. OF 3RD P. M.
NOV. 4TH 1884.

5

N. W. E. S.

79.11 Ac.

660 ft. or 40 rods

640 ft

960 ft

1325 ft or 80 rods

560 ft. or 33 9/10 rods

1545 ft or 93 rods

510 ft. or 30 9/10 rods

1085 ft or 65 9/10 rods

600 ft or 36 9/10 rods

700 ft or 42 9/10 rods

694 ft. or 42 rods

Wet marsh

Sand Bottom

Sand

Mud

Note

Small figures in red give the elevation above Village Datum
Height of water in Hyde Lake November 4th 84. 2.44

Large figures in Red give the distance in feet and rods from water's edge or meander line to water's edge on November 4th 1884.

29

Scale of Chains

Scale of Feet

Indiana Road

Stage Road

Gravel Bed

Creek

Swamp

Marsh

Mud

Sand

Rocks

Willow Tree & dia

Oak Tree

Oak Stump

Pine Tree

Hollow Tree

Log

Rail Fence

Board Fence

Dwelling House

Barn

Out Houses

Well

Spring

Bridge

Road

Path

Boundary Line

Section Line

Quarter Section Line

Meander Line

Creek

Ditch

Swamp

Marsh

Mud

Sand

Rocks

Gravel Bed

Stage Road

Indiana Road

Defts Exh 4

Defts Exhibit 4.

MAP SHOWING TOPOGRAPHY
IN SECTIONS 19.20.29.30. IN TOWN 37.
NORTH RANGE 15 E. OF 3rd P. M.
NOV. 4 TH 1884.

P. 80
No. 167

5

N.
W. E.
S.

19

30

Indiana State Road

Chittenden's Bridge

Outlet

Small figures in red give the elevation above Village Datum.
Height of water in Hyde Lake November 4th '84. 2.44

Large figures in Red give the distance in feet and rods from water's edge or meander line to water's edge on November 4th 1884.

79.11 Ac.

28.49 Ac.

660 ft. or 40 rods

640 ft.

560 ft. or 33 9/10 rods

510 ft. or 30 9/10 rods

600 ft. or 36 3/10 rods

700 ft. or 42 4/10 rods

694 ft. or 42 rods

1085 ft. or 65 7/10 rods

600 ft. or 36 3/10 rods

154 or 93 1/10 rods

1325 ft. or 80 1/2 rods

960 ft.

787 ft.

Sand Bottom

Willow Bushes

Mud

Sand

Sand bottom

Willow Dec 6" dia.

Buoy

18 Poplars 4"

Willow 4"

Willow 12" dia.

Coll. p. 137
Inv. No. 161

SCALE OF CHAINS

SCALE OF FEET

Large figures in red give the elevation above Village Datum
Height of water in Hyde Lake November 4th 84 2.44

Note Small figures in red give the distance in feet from water's edge or meander line to water's edge on November 4th 1884.

Indiana Stage Road

Outlet

Sand Bottom

Sand Bar

Gravel Bar

Willow Tree & Alder

Sand

Mud

Mud Mud

Sand Bottom

Sand Bottom

Willow Trees

Sand Bottom

Indiana Stage Road

Chittenden's Village

Oak Stump 24"

Oak 18"
Cherry 15"
Linnwood 24"

Oak Stump 24"

Oak Stump 24"

Elm 48"

Elm 36"
Oak Stump 24"

Oak Stump 24"

Elm 42"
Elm 36"
Elm 24"
Elm 15"
Elm 24"
Elm 15"
Elm 24"
Elm 15

Exhibit 5.

Township 37. North of the Baseline, Range 15. East of the 3d principal Meridian

Rec'd Oct 4th with Sur Genl's letter of Aug 27th 1839

Page 93
No. 167

Quantities marked in Tract Books Oct 28th 1839

Surveyor Generals office
Saint Louis 26th August 1839

The mile points designated on the State line are the points perpetuated one mile apart according to the measurement on the said line at the time of the survey thereof. Their numbers are progressive from the intersection with the Wabash river. The distances set down between said mile points are according to the measurement of Mr Sibley and where the distances between the points are not designated on this map the said points were not found by Mr Sibley

William Milburn
Surveyor General

Surveyor Generals office
Saint Louis 19th august 1839

This plat of fractional township 37. north of the base line range 15. east of the 3d principal meridian South east of "old Indian boundary line" South west of Lake Michigan, and west of the line of demarcation between the States of Indiana and Illinois is strictly conformable to the field notes of the survey of said fractional township, on file in this office which have been examined and approved. The line designated "old Indian boundary line" was originally surveyed in the 1st quarter of 1819 by James Mc Duncan assisted by John C Sullivan under a letter of instruction from William Austin Surveyor of the Lands of the United States in Illinois and Missouri dated October the 18 1818, authorizing Sullivan as Surveyor and Duncan as assistant to survey under the direction of Commissioners Graham and Phelps appointed by the President of the United States to run the lines of the tracts ceded by the treaty of Saint Louis of the 24th of August 1816 (Page 177. and following Land laws. edition of 1828) This being the line agreed to be run from a point on Lake Michigan 10 miles southward of the mouth of the Chicago creek via Aderick Linn to a point on the Kankakee 10 miles above its mouth and was found by said Sullivan and Duncan to run S 45° 2' W 43 miles & 18 chains. The said "old Indian boundary line" was retraced and the mile points thereon were renewed by D A Spaulding in the 2d quarter of 1834, under contract of the 3d of October 1833. It was the original survey of the Indian line to which the survey to the N.W was closed, and the said Indian line is laid down on this map in accordance with the notes of Spaulding. The east boundary line which is the line between the States of Indiana and Illinois was surveyed or rather a line which had been formerly run was "retraced marked and measured" in the 1st or 2d quarter of 1834, by Silvester Sibley under the provisions of the act of Congress of the 2d of March 1833 - "to authorize the President of the United States to cause the public surveys to be connected with the line of demarcation between the States of Indiana and Illinois" as certified to this office on the 10th of June 1834 by Mr J. Williams Surveyor General of Ohio Indiana and Michigan. The west and south boundary lines were surveyed in the 2d quarter of 1834 The subdivision lines and meanders of "Little Calumick" "river" Lake Michigan" and "navigable Lake" were surveyed in the 2d quarter of 1834 and 1st quarter of 1835 - all by John a Clark, under two contract of the 22d of September 1833.

William Milburn
Surveyor General

19th day of August 1839

Note

In retracing the State line Mr Sibley states in his field notes of the 158 mile at 3782 chains Lake Lake Michigan bears North and he comes to the 158 mile point at 81.52 chains which gives for the length of the east boundary of Section 20 of the township inclusive of the falling of the north boundary of the said Section 9.44 chains north of the 158 mile point only 4.08 chains according to the meanders of the lake along the southern boundary of Section 20 as created by John a Clark the east boundary thereof is 62.69 chains - Mr Sibley did not establish a corner at the above called for intersection of the Lake and State line and therefore the length of the said east boundary of Section 20 is set down according to the Estimate of Mr Clark's meanders of the Lake namely 62.69 chains and the calculation of the areas of the said Section 20 was made accordingly

William Milburn
Surveyor General

Surveyor Generals office Saint Louis 26 August 1839

Mr Spaulding did not find any of the old mile points on the indian boundary in 6 of the 7 mile - he therefore established new mile points between the old Seventh and Lake Michigan on the line surveyed by Duncan as indicated on position by the identified fractional Section corners of the old survey & the N W to designated on this plat and the plat of 37 N 15 W 6 - according to Spaulding's operations the old Indian boundary between the lake and the 7th mile falls 9.85 chains East of its length as reported by Duncan as is seen by this plat on which it is but 70 15 chs from the Lake at the mouth of the Little Calumick to the re established first mile point

William Milburn
Surveyor General

Also P. 132
in No. 161

Scale of 40 chains to an inch

Aggregate area 4552.03 acres

Variation on Old Indian boundary as stated on line — on line between the States of Indiana & Illinois 6°40' East — on all the other lines 6° 40' East —

Copies of Diagrams of the survey of fol Secs 19, 20, 29, 30, 31 & 32 of this Tp. of the formerly navigable Lake were sent to the Registers of the State Land office & U.S Land office Jany 7th 1875 with copy of the field notes to the former

Department of the Interior Genl Land Office
31 December 1874

I hereby certify that the above is a correct plat of survey executed by Alexander Wolcott Deputy Surveyor under contract bearing date the 8th day of September 1874 of a meandered Lake in Tract Sections 19, 20, 29, 30, 31 & 32, Township No. 37 North Range No 16 East of 3d principal Meridian in the State of Illinois and is strictly conformable to the field notes of the survey thereof, which have been examined and approved

Area 1.283 1/100 Acres

S S Burdett
Commissioner and Ex officio Surveyor General of Illinois

DEF'TS - EXHIBIT — 4

N

W E

S

INDIAN RIDGE ROAD

INDIANA STATE ROAD

CHITTENDEN'S BRIDGE

OUTLET

19

20

29

79.11 Ac.

660 FT.

40 RDS.

38.3 RDS.

27.2 RDS.

28.14 AC

33.9 RDS.

510 FT.

30.9 RDS.

660 FT.

36.3 RDS.

660 FT.

42.4 RDS.

36.2 AC

17.8 RDS.

4.52 AC

47.6 RDS.

52.1 RDS.

80.8 RDS.

93.6 RDS.

65.7 RDS.

36.3 RDS.

42 RDS.

42.4 RDS.

91.1 RDS.

2.94 AC

WET MARSH

SAND BOTTOM

SAND.

MUD

MEANDER

GRAVEL BED

NOTE SMALL FIGURES IN RED GIVE THE ELEVATION ABOVE VILLAGE DATUM SAME AS CITY DATUM

HEIGHT OF WATER IN HYDE LAKE NOVEMBER 4TH 1884 2.44

LARGE FIGURES IN RED GIVE THE DISTANCE IN RODS FROM WATER'S EDGE OR MEANDER LINES TO WATER'S EDGE, ON NOVEMBER 4TH 1884.

DEF'TS EXHIBIT — 4

N

W E

S

19

20

29

30

INDIAN RIDGE ROAD

INDIANA STAGE ROAD

CHITTENDEN'S BRIDGE

OUTLET

WET MARSH

SAND BOTTOM

SAND.

GRAVEL BED

7.91 Ac.

660 FT.

40 RDS.

38.3 RDS.

27.2 RDS.

28.74 AC.

33.9 R.

30.9 R.

600 FT. on

36.3 Rds

700 FT. on

42.4 Rds

52.1 RDS.

47.6 RDS.

80.3 RDS.

93.6 RDS.

65.7 RDS.

36.3 RDS.

42.4 RDS.

91.1 RDS.

6.9 RDS.

2.04 AC

7.8 RDS.

45.2 AC

NOTE SMALL FIGURES IN RED GIVE THE ELEVATION ABOVE VILLAGE DATUM SAME AS CITY DATUM

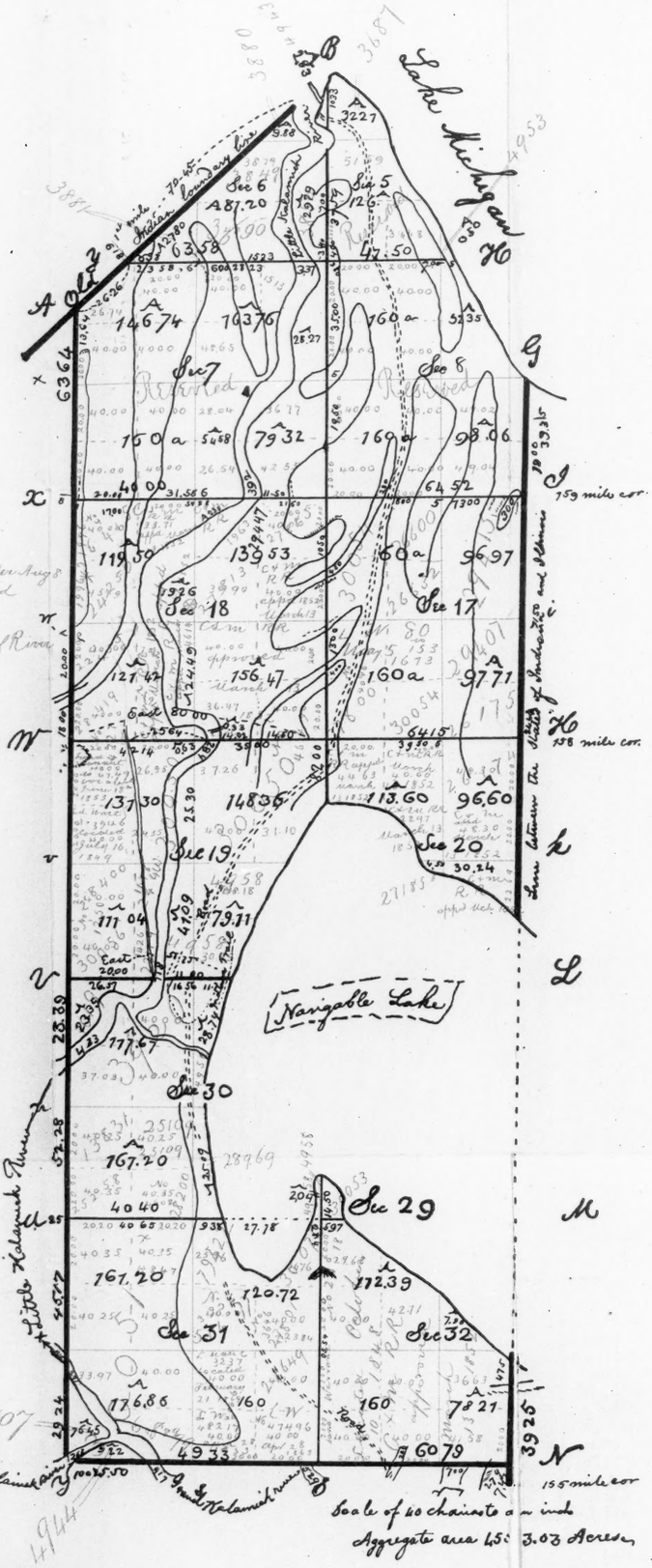
HEIGHT OF WATER IN HYDE LAKE NOVEMBER 4TH 84 244

LARGE FIGURES IN RED GIVE THE DISTANCE IN RODS FROM WATER'S EDGE OR MEANDER LINES TO WATER'S EDGE, ON NOVEMBER 4TH 1884.

8

Township 37 North of the base line Range 15 East of the 3rd principal Meridian

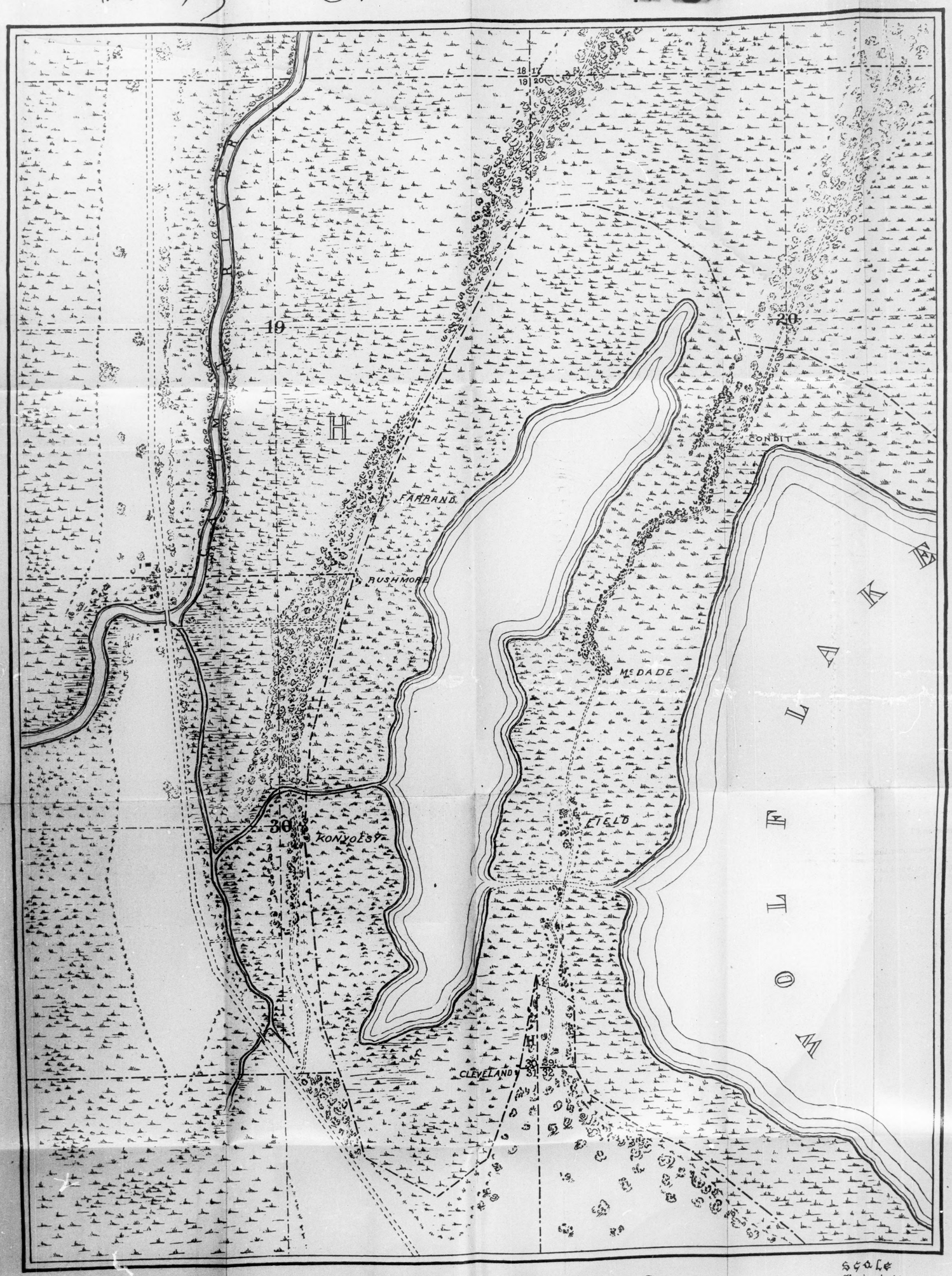
No. 167
P. 64


Lake Michigan
Indian boundary line
Little Kalamazoo River
Navigable Lake
Sec 6
Sec 7
Sec 8
Sec 17
Sec 18
Sec 19
Sec 20
Sec 29
Sec 30
Sec 31
Sec32
A
B
G
H
I
J
K
L
M
N
V
W
X
1/4 mile
1/2 mile
1/4 mile
1/2 mile
1/4 mile
1/2 mile

Page 90
No. 167

Defts Exhibit 4½

10



John A. Cole C.E.
69 Ashland Block.

Plat showing topography of parts of
Sections 19, 20, 29, 30, 31 & 32 T. 37 N. R. 15 E. of 3d P M.
1883.

Scale
10 Chains to 1 inch.

Exhibit 5.

93

Township 37. North of the Baseline, Range 15. East of the 3d Principal Meridian

Rec'd Oct 4th with Surv Genl's letter of Aug 27th 1839

Page 93
No. 167

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Surveyor Generals office
Saint Louis 26th August 1839

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William Milburn
Surveyor General

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Saint Louis 19th august 1839

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William Milburn
Surveyor General

19th day of August 1839

Note

In retracing the State line Mr Sibley states in his field notes of the 158th mile at "3782 chains Came to a stake & marsh" and he comes to the 159th mile point at 81.50 chs which gives for the length of the east boundary of Section 20 of this township inclusive of the fallings of the north boundary of the said Section 4246 chains north of the 158th mile Point only 4608 Chains according to the meanders of the lake along the southern boundary of Section 20 as certified by John A Clark the exact boundary thereof is 62.69 chains- Mr Sibley did not establish a corner at the above called for intersection of the Lake and State line and therefore the length of the said east boundary of section 20 is set down according to the Certificate of Mr Clark's meanders of the Lake namely "62.69 chains" and the calculation of the areas of the said Section 20 was made accordingly

William Milburn
Surveyor General

Surveyor Generals office Saint Louis 26 August 1839

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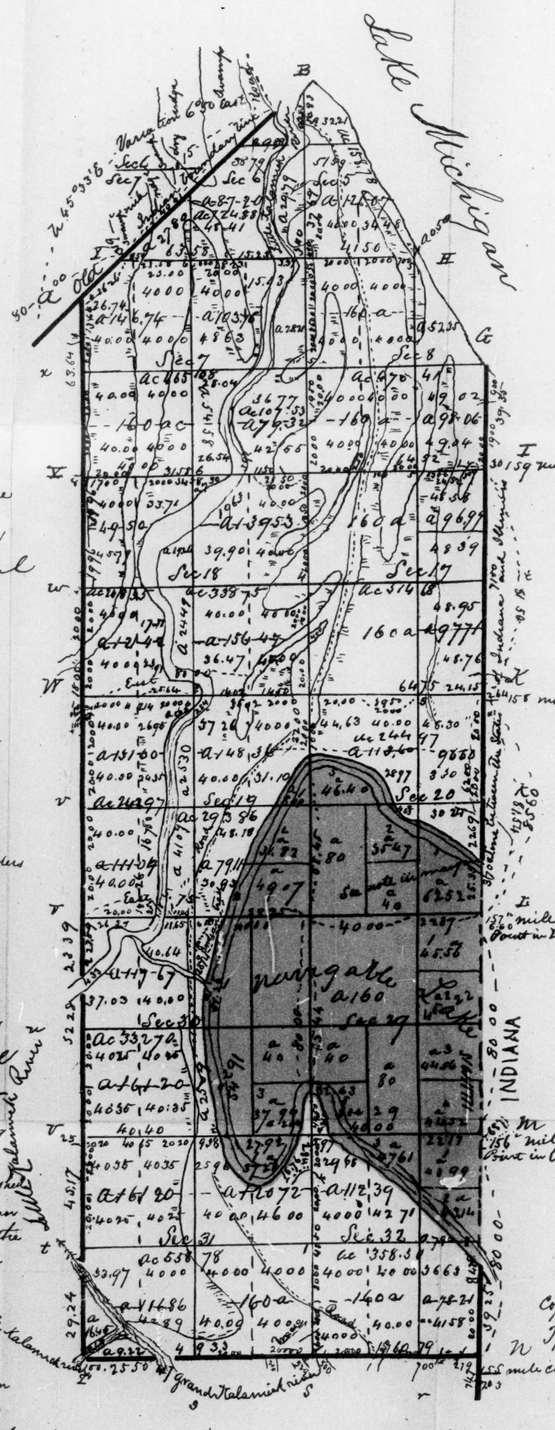
William Milburn
Surveyor General



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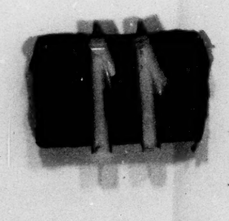

DEF'TS - EXHIBIT — 4

N

W. E

S

INDIAN RIDGE ROAD

INDIANA STAGE ROAD

CHITTENDEN'S BRIDGE

19

20

29

30

7911 Ac. 660 FT 40 RDS.

38.3 RDS.

27.2 RDS.

28.74 Ac. 33.9 Rds.

510 FT on 30.9 Rds.

600 FT on 36.3 RDS

700 FT. on 42.4 RDS

42.4 RDS.

36.3 RDS.

65.1 RDS.

93.6 RDS.

80.3 RDS.

52.1 RDS.

47.6 RDS.

7.8 RDS 4.52 AC

6.39 RDS.

91.1 RDS.

2.04 AC

WET MARSH

SAND BOTTOM

SAND.

GRAVEL BED

MEANDER

OUTLET

NOTE SMALL FIGURES IN RED GIVE THE ELEVATION ABOVE VILLAGE DATUM

SAME AS CITY DATUM

HEIGHT OF WATER IN HYDE LAKE NOVEMBER 4TH 1884 2.44

LARGE FIGURES IN RED GIVE THE DISTANCE IN RODS FROM WATER'S EDGE OR MEANDER LINES TO WATER'S EDGE, ON NOVEMBER 4TH 1884.